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6 **UNITED STATES BANKRUPTCY COURT**

7 **DISTRICT OF NEVADA**

8 In re
 9 LAS VEGAS LAND PARTNERS, LLC,
 10 Debtor.

Case No. BK-S-19-15333-MKN
 Chapter 7

**OPPOSITION TO MOTION FOR ORDER
 GRANTING DEBTOR AN EXTENSION OF
 TIME WITHIN WHICH TO FILE
 SCHEDULES AND STATEMENTS**

Hearing Date: October 9, 2019
 Hearing Time: 2:30 p.m.

14 Russell L. Nype and Revenue Plus, LLC (collectively, "Nype"), by and through their
 15 counsel Schwartz & McPherson Law Firm, hereby file their Opposition To Motion For Order
 16 Granting Debtor An Extension Of Time Within Which To File Schedules And Statement
 17 ("Opposition"). This Opposition is made and based upon 11 U.S.C. § 105(a) and § 521,
 18 Fed.R.Bankr. P. 1007, LR 1007, the Points and Authorities set forth herein, the pleadings on file
 19 of which Nype respectfully requests that this Court take judicial notice, and any argument
 20 entertained at the time of the hearing on this matter.

21 **INTRODUCTION**

22 The Debtor's request to have a total of 44 days from the date of its petition to file the
 23 required schedules and statement of financial affairs must be denied. This bankruptcy filing is
 24 merely a further tactic in the Debtor's ongoing attempts to delay litigation pending since 2016 in
 25 Clark County, Nevada. While the Debtor's bankruptcy filing certainly stayed the state court
 26 litigation against it, the Debtor was not successful in delaying the pending state court litigation
 27 against the numerous related non-debtor defendants. The Debtor's goal was to stay the whole
 28 state court litigation, and now it finds itself stuck with this bankruptcy case, requiring that it

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disclose financial information about itself under penalty of perjury, and it really doesn't want to do so.

POINTS AND AUTHORITIES

Factual Background

A. State Court Litigation

1. On July 26, 2016, Nype filed a complaint (the "Complaint") initiating an action in the Clark County District Court in Nevada ("State Court"), Case No. A-16-740689-B ("State Court Litigation"). LVLP is a defendant in the State Court Litigation, along with related defendants David J. Mitchell, Meyer Property, Ltd., Zoe Property, LLC, Leah Property, LLC, Wink One, LLC, Live Work, LLC, Live Work Manager, LLC, Aquarius Owner, LLC, LVLP Holdings, LLC, Mitchell Holdings, LLC, Live Works Tic Successor, LLC (hereinafter collectively referred as to the "Mitchell Defendants") and defendants Barnet Liberman, 305 Las Vegas, LLC, and Casino Coolidge, LLC.

2. The State Court Litigation stems from a 2015, multi-million-dollar judgment (the "Judgment") that Russell Nype and Revenue Plus, LLC ("collectively, "Nype") obtained against Defendant Las Vegas Land Partners, LLC ("LVLP"), for services Nype provided to LVLP—in 2006—but for which LVLP refused to pay. The Judgment was entered in Case No. A-07-551073 after nearly 8 years of unbelievably expensive litigation.

3. In the Complaint, Nype alleges, in general, that LVLP transferred assets worth millions of dollars from 2006 to the present to prevent Nype from executing on the Judgment, and also that the named defendants are alter egos and/or received fraudulent transfers.

4. LVLP has sought to delay the State Court Litigation. In fact, on May 30, 2019, the State Court entered an Order Compelling Discovery and Awarding Sanctions, which briefly extended discovery for limited purposes.

5. LVLP and the Mitchell Defendants failed to comply with the Order Compelling Discovery. As a result, Nype filed a Motion for Discovery Sanctions Pursuant to NRCP 37(b) ("Sanctions Motion") which was heard on June 24, 2019. At this hearing, the State Court expressly found that sanctions were appropriate, and as such, the only unresolved question would

1 be the degree of sanctions.

2 6. Consequently, the State Court scheduled an evidentiary hearing to commence June
3 27, 2019, the first of three evidentiary hearing dates relevant to a determination of Nype's
4 Sanctions Motion.

5 7. LVLP and the Mitchell Defendants filed no opposition to Nype's Motion for
6 Sanctions, nor did LVLP and the Mitchell Defendants personally appear in court at either of the
7 first two days of the evidentiary hearing, i.e., June 27, 2019 and July 9, 2019. The third
8 evidentiary hearing date was set for September 3, 2019.

9 8. On or about August 28, 2019, LVLP filed a Notice of Bankruptcy, notifying the
10 State Court of an August 19, 2019 bankruptcy petition filed solely by LVLP. In addition, LVLP
11 filed an Emergency Motion to Stay in the State Court Litigation on September 2, 2019, requesting
12 that the State Court Litigation be completely stayed, not just with respect to LVLP. See attached
13 **Exhibit 1.**

14 9. Despite LVLP's misdirected effort to stay the whole State Court Litigation by
15 filing a bankruptcy petition, the State Court determined that the LVLP Chapter 7 petition did not
16 stay actions against the non-debtor defendants in the State Court Litigation.¹ At the hearing on
17 September 3, 2019, the State Court held the Mitchell Defendants in contempt and awarded
18 sanctions of over \$160,000.00 to Nype.

19 **B. Bankruptcy Filing by LVLP**

20 10. On August 19, 2019, LVLP filed a voluntary petition for relief under Chapter 7 of
21 the Bankruptcy Code (the "Petition"). The § 341(a) meeting of creditors was scheduled for
22 September 25, 2019.

23 11. A Notice of Incomplete and/or Deficient Filing was filed on August 20, 2019 [ECF
24 4]. The Petition was filed without schedules and the statement of financial affairs and related
25 documents.

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27
28 ¹ At the time of the continued evidentiary hearing on September 3, 2019, Nype noted on the record that in light of
LVLP's bankruptcy filing, they were no longer going to be proceeding as of the final hearing date with respect to the

12. On September 3, 2019, the Debtor filed its Motion For Order Granting Debtor An Extension Of Time Within Which To File Schedules And Statements (the "Extension Motion") [ECF 8]. In support of the Extension Motion, the Debtor filed a Declaration of its counsel, H. Stan Johnson, Esq. [ECF 9].

13. The Extension Motion requests an additional 30 days from the date of the Extension Motion, or 44 days from the date the Petition was filed. The asserted reason for the extension is that LVLP is in the process of compiling the information needed for the bankruptcy filing but finalization of this information will extend past the current deadline. The Debtor asserts that it "is involved in complex state court litigation, which has had a number of recent hearings and issues. Due to these circumstances, Debtor's manager and accountant have been unable to assemble the information needed to complete the bankruptcy schedules." Extension Motion at p. 2.

14. LVLP's contentions that it has been too involved in the State Court Litigation to comply with its obligations under the Bankruptcy Code, which are not supported by admissible evidence, must not be given any weight. Notably, LVLP has been protected by the automatic stay and during this time it has not been participating in the State Court Litigation, not been providing discovery, not opposing Nype's Sanctions Motion, nor even attending the evidentiary hearings, giving the Debtor ample time to assemble the required information.

15. LVLP and the Mitchell Defendants are all represented by the same counsel, Cohen Johnson Parker Edwards, in the State Court Litigation, and this counsel also filed LVLP's Chapter 7 bankruptcy petition.

Memorandum of Law

A. "Cause" Has Not Been Established Under Fed.R.Bankr. P. 1007(a)(5) and 1007(c)

The filing deadlines in Fed.R.Bankr. P. 1007 are mandatory and require strict adherence. *In re Greene*, 127 B.R. 805 (Bankr. N.D.Ohio 1991). The schedules and statements, are designed to obtain information necessary to the proper administration and adjudication of the case. *In re*

discovery issues against LVLP.

1 *Weldon*, 184 B.R. 710, 715 (Bankr. D.S.C. 1995).

2 Bankruptcy Rules 1007(a)(5)² and 1007(c),³ by their respective terms, authorize courts,
3 upon a showing of “cause,” to grant extensions of the time periods applicable to various filings a
4 debtor is required to make. “Extensions of time under Rule 1007(c) are not handed out as a matter
5 of course, but only upon a showing of cause.” *See Tillman v. Danielson (In re Tillman)*, 2008 WL
6 8462961 at *4 (9th Cir. BAP July 17, 2008)(citing mandate set forth in the lower court’s local
7 rules for the proposition that requests for extension of time under Fed.R.Bankr. P. 1007 must be
8 supported by admissible evidence); *McInnis v. Santa Cruz County Tax Collector*, 2018 WL
9 6565413 at *7 (9th Cir. BAP Dec. 10, 2018).

10 Here, the Debtor has not shown evidence of “cause.” The Debtor’s attorney filed a
11 declaration, not the Debtor’s managing member who signed the petition (David Mitchell). “A
12 declarant must show personal knowledge and competency to testify by the facts stated.” *Boyd v.*
13 *City of Oakland*, 458 F.Supp.2d 1015, 1023 (N.D. Cal. 2006). “The matters must be known to the
14 declarant personally, as distinguished from matters of opinion or hearsay.” *Id.* “A declarant’s
15 mere assertions that he or she possesses personal knowledge and competency to testify are not
16 sufficient.” *Id.* The declaration made by Debtor’s counsel is based on being “familiar with the
17 facts of this case” but does not provide that he possesses personal knowledge regarding the matters
18 set forth therein, including the basis for the requested extension. In addition, Debtor’s counsel is
19 also counsel for the Mitchell Defendants in the State Court Litigation, demonstrating that there is a
20 concerted and collective effort on the part of the Mitchell Defendants in the State Court Litigation

21 _____
22 ² Rule 1007(a)(5) provides:

23 Any extension of time for the filing of the lists required by this subdivision may be granted only on
24 motion for cause shown and on notice to the United States trustee and to any trustee, committee
elected under §705 or appointed under §1102 of the Code, or other party as the court may direct.

25 ³ Rule 1007(c) provides, in relevant part:

26 (c) *Time Limits.* ... Any extension of time for the filing of the schedules and statements may be
27 granted only on motion for cause shown and on notice to the United States trustee and to any
28 committee elected under Sec. 705 or appointed under Sec. 1102 of the Code, trustee, examiner, or
other party as the court may direct. Notice of an extension shall be given to the United States trustee
and to any committee, trustee, or other party as the court may direct.

1 to delay. Further, there is no evidence from the Debtor's representatives itself. As a result, the
 2 Debtor has not established "cause" for its lengthy extension.

3 **B. The Debtor Has Had More Than Sufficient Time To File The Required Schedules**
 4 **And Statement Of Financial Affairs**

5 The Debtor has been in possession of the information needed to complete and file
 6 schedules, statements, and other documents required under § 521 and Fed.R.Bankr. P. 1007 for
 7 quite some time. Much of this information was required to be produced by them in connection
 8 with the State Court Litigation and the requests for discovery in that action. An extension of time
 9 for the Debtor to make the filings required by § 521 and Fed.R.Bankr. P. 1007 in a timely manner
 10 is, therefore, unnecessary. Furthermore, the Debtor has requested 44 additional days from the
 11 Petition date to file this information. This is an excessive amount of time given the circumstances.

12 **CONCLUSION**

13 Based upon the foregoing, Nype respectfully requests that the Debtor's Motion For Order
 14 Granting Debtor An Extension Of Time Within Which To File Schedules And Statement be
 15 denied and that Nype be granted other relief as is appropriate.

16 Dated: September 23, 2019.

18 /s/ Jeanette E. McPherson

19 Lenard E. Schwartz, Esq.

20 Jeanette E. McPherson, Esq.

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22 2850 South Jones Blvd., Suite 1

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24 *Attorneys for Russell L. Nype and Revenue Plus, LLC*

EXHIBIT 1

ELECTRONICALLY SERVED
9/2/2019 2:01 PM**COHEN | JOHNSON | PARKER | EDWARDS**

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*Attorneys for Mitchell Defendants***EIGHTH JUDICIAL DISTRICT COURT****CLARK COUNTY, NEVADA**

RUSSELL L. NYPE; REVENUE PLUS,
LLC, DOES I through X; DOE
CORPORATIONS I through X; and DOE
PARTNERSHIPS I through X;

Plaintiffs,

vs.

DAVID J. MITCHELL; BARNET
LIBERMAN;
LAS VEGAS LAND PARTNERS, LLC;
MEYER PROPERTY LTD.; ZOE
PROPERTY, LLC; LEAH PROPERTY,
LLC; WINK ONE, LLC; AQUARIUS
OWNER, LLC; LVLP HOLDINGS, LLC;
MITCHELL HOLDINGS, LLC;
LIBERMAN HOLDINGS, LLC; 305 LAS
VEGAS, LLC; LIVE WORKS TIC
SUCCESSOR, LLC; CASINO COOLIDGE
LLC; DOES I THROUGH III, inclusive;
and ROE CORPORATIONS I THROUGH
III, inclusive,

Defendants.

Case No.: A-16-740689-B

Dept. No.: 11

EMERGENCY MOTION TO STAY THESE STATE COURT PROCEEDINGS
ON AN ORDER SHORTENING TIME

COMES NOW Defendants, David J. Mitchell, Las Vegas Land Partners, LLC, Meyer Property, Ltd., Zoe Property, LLC, Leah Property, LLC, Wink One, LLC, Live Work, LLC, Live Work Manager, LLC, Aquarius Owner, LLC, LVLPL Holdings, LLC, Mitchell Holdings, LLC, and Live Works Tic Successor, LLC, (the "Mitchell Defendants") by and through its counsel of record, H. Stan Johnson, Esq. and James L. Edwards, Esq., of Cohen Johnson Parker Edwards, hereby files this *Emergency Motion to Stay These State Court Proceedings on an Order Shortening Time*. Plaintiffs are continuing to litigate the case before this court against LVPG, LLC and to recover a judgment in violation of the automatic stay imposed as a result of the Chapter 7 Bankruptcy filing of Defendant Las Vegas Land Partners, LLC. The Mitchell Defendants request that this Court stay this State Court proceeding, case A-16-740689-B.

This Motion is based on the following memorandum and the pleadings and filings submitted thus far herein, the Declaration of H. Stan Johnson, Esq. attached hereto, and any oral argument at the hearing on this matter.

Dated this 2nd day of September 2019.

COHEN JOHNSON PARKER EDWARDS

/s/ H. Stan Johnson, Esq

H. STAN JOHNSON, ESQ.

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DECLARATION OF H. STAN JOHNSON, ESQ.

I, H. Stan Johnson, do hereby affirm under penalty of perjury, that the assertions in this Declaration are true, as follows:

1. I am an attorney at law admitted to practice before the Courts of the State of Nevada and am counsel of record for the Mitchell Defendants, in the case of Russell L. Nype and Revenue Plus, LLC v. the David J. Mitchell et. al., Eighth Judicial District Court Case No. A-16-740689-B before Department 11.

2. This Declaration is submitted in support of the Mitchell Defendants' EMERGENCY MOTION TO STAY THESE STATE COURT PROCEEDINGS ON AN ORDER SHORTENING TIME.

3. If called upon to testify to the contents of this Declaration, I could and would competently do so under oath.

4. Attached hereto as Exhibit "A" is a true and correct copy of Plaintiffs' Amended Complaint ("Complaint") filed in EJDC Case No. A-16-740689-B, pending in Department 11, filed on August 21, 2017.

5. Attached hereto as Exhibit "B" is a true and correct copy of the Decision of the 9th Circuit's Bankruptcy Appellate Panel in *Capriati Construction Corporation, Inc., v. Sper, Inc.*, BAP No. NV-17-1200-BHTa.

6. On the 19th day of August, 2019, Las Vegas Land Partners, LLC filed for Chapter 7 Bankruptcy protection in the United States Bankruptcy Court for the District of Nevada, case no. 19-15333-mkn. Attached hereto as Exhibit "C" is a true and correct copy of the bankruptcy petition of Las Vegas Land Partners, LLC.

7. Despite being served with a *Notice of Bankruptcy Filing*, Plaintiffs have continued their attempts to collect a judgment against the Mitchell Defendants in violation of the automatic stay.

8. It is respectfully submitted that the above and foregoing establishes good cause to grant the Order Shortening Time on the Mitchell Defendants' Motion to Stay these State Court Proceedings.

ORDER SHORTENING TIME

GOOD CAUSE appearing therefore, **IT IS HEREBY ORDERED** that the time for the hearing on the Mitchell Defendants' *Emergency Motion to Stay State Court Proceedings on an Order Shortening Time* shall be shortened to the ____ day of _____ 2019 at ____:____ a.m/p.m. Any opposition shall be filed and served by the ____ day of _____ 2019 at ____:____ a.m/p.m. and any reply in support thereof shall be filed by oral argument.

Dated this ____ day of _____ 2019.

DISTRICT COURT JUDGE

Respectfully Submitted by:

/s/ H. STAN JOHNSON
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 STATEMENT OF FACTS

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5 On or about April 10, 2015, Judgment was entered in favor of Plaintiffs and against

6 Defendant, Las Vegas Land Partners, LLC (hereinafter "LVLP") in the amount of

7 \$2,608,797,50. Since 2015, Plaintiffs have aggressively pursued collection on the Judgment

8 against LVLP. On or about July 26, 2016, Plaintiffs, Russell L. Nype and Revenue Plus, LLC

9 (hereinafter "Plaintiffs") filed their Complaint for constructive trust, fraudulent Conveyance,

10 civil conspiracy, declaratory relief and alter ego against Defendants,

11

12 In their Complaint, Plaintiffs generally allege that LVLP transferred real property and

13 millions of dollars to asset protection entities from 2006 to the present to prevent Plaintiffs from

14 executing on the judgment. Plaintiffs allege that Defendants' were either fraudulent transferees

15 or are alter egos of LVLP and Defendants, David J. Mitchell and Barnet Liberman.

16

17 An evidentiary hearing was set for September 3rd. However, Las Vegas Land Partners,

18 LLC filed for chapter 7 bankruptcy protection in the United States Bankruptcy Court for the

19 District of Nevada, Case No. 19-15333-mkn on August 19, 2019 which imposed the

20 automatic stay on the present proceedings. Attached hereto is a copy of the petition

21 filed by LVPG as Exhibit C. Plaintiffs were served with a Notice of Bankruptcy

22 Filing on August 28, 2019. However, Plaintiffs are violating the automatic stay by

23 continuing their efforts to prosecute the State Court action and collect a judgment

24 against Las Vegas Land Partners, LLC.

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II.

LEGAL ARGUMENTA. NYPE'S STATE COURT ACTION IS IN VIOLATION OF THE
AUTOMATIC STAY

Plaintiffs have attempted to recover their debt throughout the state court litigation from the judgment debtor Las Vegas Property Group, LLC ("LVPG") and from other defendants under the dependent and derivative liability theories of:

1. Constructive Trust
2. Fraudulent Conveyance
3. Civil Conspiracy
4. Declaratory Relief
5. Alter Ego

Plaintiffs acknowledge that only LVPG is the judgment debtor and that all the causes of action involve an alleged fraudulent conveyance or claim of alter ego from LVPG to the subsequent transferees or dependent entities. See, Amended Complaint attached hereto as Exhibit A.

All these causes of action are derivative from alleged actions of LVPG and cannot be litigated in any manner without litigating these causes of action against LVPG to establish the fraudulent conveyance from LVPG to the other defendants or to any subsequent transferees.

The same applies to the claims of alter ego, constructive trust or civil conspiracy. None of these claims can be litigated without directly involving LVPG in each of the causes of actions, which will violate the automatic stay.

1 The cases cited by Plaintiffs in their Trial Brief are easily distinguished from
2 the case before this court are not applicable:

- 3 1. In re Advanced Ribbons and Office Products, Inc., 125 B.R. 259, 263
4 (9th Cir. BAP 1991).

5 (A foreclosure sale against a non-debtor's property that secured a debt
6 of the debtor did not violate automatic stay.)

- 7 2. In re Rohnert Park Auto Parts, Inc., 113 B.R. 610, 614 (9th Cir. BAP
8 1990)

9 (Objection to plan confirmation that contained provisions barring suits
10 against co-debtors for five years)

- 11 3. In re Condel, Inc., (91 B.R. 79, 82 (9th Cir. BAP 1988);

12 (Objection to plan confirmation that included provisions that the IRS
13 could not pursue enforcement activities against debtor's officers that
14 had personal liability for trust fund taxes)

- 15 4. In re Casgul of Nevada, Inc., 22 B.R. 65, 66-67 (9th Cir. BAP 1982).

16 (Involved relief from the stay to foreclose on debtor's officers' property.
17 The stay did not apply to debtor's officers' property)

18 None of the cases cited by Plaintiffs are remotely on point involving litigation
19 for fraudulent conveyance and alter ego causes of action directly against the debtor
20 and derivative actions against the other defendants. It is obvious that an action
21 directly against the debtor LVPG for fraudulent conveyance and alter ego cannot be
22 litigated without violating 11 USC § 362. 11 USC § 362 provides:

23 (a) Except as provided in subsection (b) of this section, a petition filed
24 under section 301, 302, or 303 of this title, or an application filed under
25 section 5(a)(3) of the Securities Investor Protection Act of 1970, operates
26 as a stay, applicable to all entities, of—
27
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(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

There is no question that the state court litigation involves the continuation of a judicial action against the debtor and that it is an effort to enforce a judgment against the debtor or against property of the estate.

B. PLAINTIFFS NO LONGER HAVE STANDING TO PURSUE ANY CLAIM FOR FRAUDULENT TRANSFER AND ALTER EGO CLAIMS.

1. Fraudulent Conveyance Actions Are Property of the Estate.

It is well established under applicable law that fraudulent transfer claims and alter ego claims are property of the bankruptcy estate pursuant to USC § 541. The causes of action asserted by the Plaintiffs belong exclusively to the debtor's estate and as such can only be brought or prosecuted by the bankruptcy trustee.

Section 548(a) of the Code expressly authorizes a "trustee" to avoid any pre-petition "fraudulent transfers". 11 U.S.C. §548(a)(1). Section 544(b) further authorizes the "trustee" to avoid any pre-petition transfer of the debtor's property if the transfer could be avoided under applicable law by an unsecured creditor holding

1 an allowable claim. "Applicable law" within the purview of 544(b)(1) includes state
 2 fraudulent transfer law, including Nevada's enactment of the Uniform Fraudulent
 3 Transfer Act ("UFTA") as codified in NRS Chapter 112. *Decker v. Tramiel* (In re JTS
 4 Corp.), 617 F.3d 1102, 1111 (9th Cir.2015).

5
 6 A debtor's "causes of action" are "property of the estate." *Smith v. Arthur*
 7 *Andersen LLP*, 421 F.3d 989, 1002 (9th Cir. 2005) (Citing *United States v. Whiting*
 8 *Pools, Inc.*, 462 US 198, 205 (1983)). Thus, the trustee stands in the shoes of the
 9 debtor and has the standing to bring any suit that the debtor could have instituted
 10 had it not filed for bankruptcy relief. The Trustee's standing to sue on behalf of the
 11 estate is exclusive; a debtor's creditors cannot prosecute such claims belonging to
 12 the estate absent abandonment. *Estate of Spirtos v. One San Bernardino City*
 13 *Super. Ct.*, 443 F.3d 1172, 1175 (9th Cir. 2006).

14
 15 Moreover, courts have universally held that a trustee has the exclusive
 16 standing to bring fraudulent transfer actions; and absent court order otherwise,
 17 individual creditors lack standing to prosecute fraudulent transfers in their own
 18 right and for their own benefit, even if said creditor would have standing to do so
 19 outside of the bankruptcy. *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1252 (9th
 20 Cir.2010) (noting that rights of action properly brought by the trustee including
 21 fraudulent transfer actions); *CarrAmerica Realty Corp. v. Nvidia Corp. (In re 3dfx*
 22 *Interactive, Inc.)*, 302 Fed. Appx. 514, *1-2 (9th Cir.2008) (affirming the district
 23 court's decision that because the substance of the creditors' claims involved a
 24 debtor's fraudulent transfer of assets, thereby depleting the assets available for the
 25 bankruptcy estate, it was an injury to the debtor corporation, not to individual
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creditors of that corporation, and thus, the trustee had exclusive standing to sue with respect to all such claims [Emphasis added.]); *In re Howrey LLP*, 2014 WL 3899309 at *4 (N.D.Cal. Aug. 8, 2014) (holding that the “[t]rustee has the exclusive power to bring the claim brought by [a creditor] predicated on a fraudulent transfer theory.” [Emphasis added.]); *In re Pac. Gas & Elec. Co.*, 281 B.R. 1, 13 (Bankr.N.D.Cal.2002) (“Absent court approval, only a trustee or debtor in possession has standing to assert a fraudulent transfer action.” [Emphasis added.]).

In its State Court Action, Plaintiffs alleged, in pertinent part, that “In that context, various real property and ownership equity transfers took place between LVLP and/or Leah Property, LLC during the operative time” The same phase was used for transfers from LVLP to any of the named derivative defendants.

Plaintiffs’ own State Court allegations demonstrate that Plaintiffs’ Fraudulent Transfer claims are expressly within the purview of the claims that the bankruptcy trustee alone is empowered to pursue. 11 U.S.C. §548; *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1252 (9th Cir.2010); *CarrAmerica Realty Corp. v. Nvidia Corp. (In re 3dfx Interactive, Inc.)*, 302 Fed. Appx. 514, *1-2 (9th Cir.2008); *In re Howrey LLP*, 2014 WL 3899309 at *4 (N.D.Cal. Aug. 8, 2014); and *In re Pac. Gas & Elec. Co.*, 281 B.R. 1, 13 (Bankr.N.D.Cal.2002). Moreover, in the event that any fraudulent transfer claim prevails, the recovered assets would unequivocally be “property of the estate”. Thus, Plaintiff’s usurpation and prosecution of these alleged Fraudulent Transfer claims (which are property of the estate clearly violates the Automatic Stay.

1 In a very similar case to the one before this court the 9th Circuit's
2 Bankruptcy Appellate Panel reversed the Nevada Bankruptcy Court and stated:

3 We conclude that SPER's fraudulent transfer claim asserted in the state
4 court action was property of Capriati's bankruptcy estate by virtue of §
5 544 (b) once Capriati filed its bankruptcy petition, and such claim could
6 only be pursued by Capriati. § 548 (a); *The Cadle Co. v. Mims (In re*
7 *Moore)*, 608 F.3d 253, 261 (5th Cir. 2010) (fraudulent transfer claims
8 become estate property "once bankruptcy is under way" by virtue of
9 trustee's successor right under § 544 (b)); *Nat'l tax Credit Partners, LP*
10 *v Havlik*, 20 F.3d 705, 708-09 (7th Cir. 1994). See also *Whiting Pools,*
11 *Inc.*, 462 US at 205 ("Section 541 (a) (1) is intended to include in the
12 estate any property made available to the estate by other provisions of
13 the bankruptcy Code," which would include property made available
14 through § 544). We reject SPER's argument that it could pursue a direct
15 claim against Rocchio as the "transferee" of a fraudulent transfer under
16 Nevada law, namely NRS 112.220, which provides for recovery of the
17 value of the asset transferred from the transferee, during the chapter 11
18 case. That statute does not consider the effect of a corporate debtor's
19 bankruptcy filing and the fact that a prepetition claim for injury to the
20 debtor by an insider's fraudulent transfers is property of the corporate
21 debtor's estate. *Capriati Construction Corporation, Inc., v. Sper, Inc.*,
22 BAP No. NV-17-1200-BHTa; (unpublished but maybe cited for
23 persuasive value it may have. (9th Cir. BAP Rule 8024-1) A copy of the
24 decision is attached hereto as Exhibit B.

2. Alter Ego Claims Are Property of the Estate.

19 Property of the estate pursuant to Section 541(a)(1) of the Code includes "all
20 legal or equitable interests of the debtor in property as of the commencement of the
21 case." 11 U.S.C. § 541(a)(1). A cause of action in which the debtor has a legal
22 interest on the petition date constitutes property of the debtor's bankruptcy estate.
23 *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002 (9th Cir.2005); *Sierra*
24 *Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir.1986);
25 *Schnelling v. Thomas (In re Agribiotech, Inc.)*, 319 B.R. 216, 219 (D.Nev.2004). A
26 bankruptcy trustee has the exclusive capacity to sue on behalf of the bankruptcy
27
28

1 estate and has the exclusive right to sue on claims belonging to the estate. 11 U.S.C.
2 §323(a); *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1250 (9th Cir.2010) (citing *Estate*
3 *of Spirtos v. San Bernadino County Superior Court (In re Spirtos)*, 443 F.3d 1172,
4 1175 (9th Cir.2006); 11 U.S.C. § 704(a)(1) (the trustee shall “collect and reduce to
5 money property of the estate for which such trustee serves”).
6

7 Whether a cause of action is property of the bankruptcy estate, such that the
8 trustee has exclusive standing to pursue the claim, or whether the claim belongs to
9 individual creditors is a question of state law. *AE Rest. Assocs., LLC v. Giampietro*
10 *(In r Giampietro)*, 317 B.R. 841, 845 n.4 (Bankr.D.Nev.2004)(quoting *Mallard Auto.*
11 *Grp., Ltd. v. LeClair Mgmt. Corp.*, 153 F.Supp.2d 1211, 1213 (D.Nev.2001).) Where
12 state law permits an alter ego claim to be asserted by a corporation in its own name,
13 such a right is property of the estate, assertible only by the bankruptcy trustee or
14 the debtor-in-possession, and a claim by a creditor against the debtor’s affiliate
15 based solely on an alter ego theory is therefore barred for lack of standing and
16 under the automatic stay. *Trustees of the Constr. Indus. & Laborers Health &*
17 *Welfare Trust v. Vasquesz*, 2011 WL 4549228 at *2 (D.Nev.Sept.29, 2011) [Emphasis
18 added]. See also, *In re AgriBioTech, Inc.*, 319 B.R. 216, 220 (2004) (“Where the
19 injury alleged is primarily to the corporation, and is injury to the plaintiff creditor
20 only insofar as it decreases the assets of the corporation to which he must look for
21 satisfaction of his debt, then the suit is for a tort suffered by the corporation, and
22 properly brought by the trustee.
23
24
25

26 Here, Nevada state law clearly permits and authorizes an alter ego claim to
27 be asserted by a corporation in its own name (“self-piercing”). *Vasquez* at 2011 WL
28

1 4549228 at *2 (“Nevada law is identical to Texas law in permitting a corporation to
2 bring an alter ego claim in its own name”). See also generally, *In re Western World*
3 *Funding, Inc.*, 52 B.R. 743, 783-84 (Bankr.D.Nev. 1985) (“Under the Nevada alter
4 ego doctrine, the corporation has, in some sense, and equitable interest in the assets
5 of its alter ego, because the corporation and the alter ego are identical.); and *In re*
6 *AgriBioTech, Inc.*, 391 B.R. 216, 219 (D.Nev.2004) (“The debtor’s estate therefore
7 includes any causes of action of the debtor at the commencement of the bankruptcy
8 proceedings.”). Moreover, when an entity is the alter ego of the debtor, the debtor
9 “has an equitable interest in the assets of its alter ego,” *Western World*, 52 B.R. at
10 784, and the right to assert an alter ego claim against said entity is property of the
11 bankruptcy estate. *Vasquez*, 2011 WL 4549228 at *2 [Emphasis added].

12
13
14 As such, it is evident that the Alter Ego asserted by Plaintiffs in the State
15 Court Action, is clearly property of the estate. Therefore, Plaintiffs’ State Court
16 Action, seeking to prosecute and benefit from an Alter Ego claim that belongs to the
17 estate usurps and converts property of the estate. Plaintiffs’ actions are also acts
18 “to obtain possession of property of the estate or of property from the estate” in
19 violation of §362(a)(3). See, *Vasquez* at *2.
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III.

CONCLUSION

Wherefore based on the foregoing it is respectfully requested that this Court enter an order staying this case and vacating any further proceedings, as any further proceedings would be in violation of the automatic stay.

Dated this 2rd day of September 2019.

By: COHEN JOHNSON PARKER EDWARDS
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INDEX OF EXHIBITS

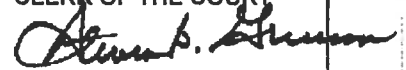
Exhibit	Description	Pages
A	Plaintiff's Amended Complaint in A-16-740689-B	36
B	Decision of the 9th Circuit's Bankruptcy Appellate Panel in Capriati Construction Corporation, Inc., v. Sper, Inc., BAP No. NV-17-1200-BHTa.	25
C	Bankruptcy Petition of Las Vegas Land Partners, LLC	8

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EXHIBIT A

EXHIBIT A

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7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 RUSSELL L. NYPE; REVENUE PLUS, LLC,
10 DOES I through X; DOES I through X; DOE
11 CORPORATIONS I through X; and DOES
12 PARTNERSHIPS I through X,

13 Plaintiffs,

CASE NO: A-16-740689-B

DEPT. NO: XV

14 vs.

AMENDED COMPLAINT FOR:

15 DAVID J. MITCHELL; BARNET LIBERMAN;
16 LAS VEGAS LAND PARTNERS, LLC; MEYER
17 PROPERTY, LTD.; ZOE PROPERTY, LLC;
18 LEAH PROPERTY, LLC; WINK ONE, LLC;
19 LIVE WORK, LLC; LIVE WORK MANAGER,
20 LLC; AQUARIAS OWNER, LLC; LVLP
21 HOLDINGS, LLC; MITCHELL HOLDINGS,
22 LLC; LIEBERMAN HOLDINGS, LLC; 305 LAS
23 VEGAS LLC; LIVE WORKS TIC SUCCESSOR,
24 LLC; FC/LIVE WORK VEGAS, LLC; CASINO
25 COLLIDGE, LLC; DOES I through III, and ROE
26 CORPORATIONS I through III, inclusive,

27 Entity Defendants.

1. CONSTRUCTIVE TRUST;
2. FRAUDULENT CONVEYANCE;
3. CONSPIRACY TO DEFRAUD;
4. DECLARATORY RELIEF; AND
5. ALTER EGO

ARBITRATION EXEMPT
(EQUITABLE RELIEF)

22 COMES NOW, Plaintiffs, RUSSELL L. NYPE and REVENUE PLUS, LLC, as and for
23 causes of action against the Entity Defendants, DAVID J. MITCHELL; BARNET LIBERMAN;
24 LAS VEGAS LAND PARTNERS, LLC; MEYER PROPERTY, LTD.; ZOE PROPERTY, LLC;
25 LEAH PROPERTY, LLC; WINK ONE, LLC; LIVE WORK, LLC; LIVE WORK MANAGER,
26 LLC; AQUARIUS OWNER, LLC; LVLP HOLDINGS, LLC; MITCHELL HOLDINGS, LLC;
27 LIEBERMAN HOLDINGS, LLC; 305 LAS VEGAS, LLC; LIVE WORKS TIC SUCCESSOR,
28

1 LLC; FC/LIVE WORK VEGAS, LLC, and CASINO COLLIDGE, LLC alleges and shows as
2 follows:

3 **GENERAL FACTUAL ALLEGATIONS**

- 4 1. Plaintiffs, RUSSELL L. NYPE and REVENUE PLUS, LLC (hereinafter "NYPE"),
5 a New York Limited Liability Company.
- 6 2. Defendant, DAVID J. MITCHELL (hereinafter "Mitchell), is an adult resident of
7 New York.
- 8 3. Defendant, BARNETT LIBERMAN (hereinafter "Liberma), is an adult resident of
9 New York.
- 10 4. LAS Vegas Land Partners (hereinafter "LVLP") is a Delaware limited liability
11 company registered to do business in Nevada, but currently in default status.
- 12 5. Aquarius Owner, LLC is or was a Delaware limited liability company registered to
13 do business in the State of Nevada in November, 2004, and maintained its
14 registration through and including approximately November, 2009.
- 15 6. On information and belief, Aquarius Owner LLC was owned and directed by
16 Mitchell, Liberman, and/or LVLP.
- 17 7. In that context, various real property and ownership equity transfers took place
18 between LVLP and/or Aquarius Owner, LLC, during the operative time, and on
19 information and belief, financial distributions and transactions occurred between
20 Aquarius Owner LLC and its principals on a recurring basis, most of which were
21 never disclosed in publicly available records or documents.
- 22 8. In that context, various real property transfers and ownership equity took place
23 between LVLP and/or Aquarius Owner, LLC during the operative time, and on
24 information and belief, financial distributions and transactions occurred between
25 Aquarius, LLC and its principals on a recurring basis, most of which were never
26
27
28

disclosed in publicly available records or documents, is a Delaware limited liability that first registered to do business in Nevada in approximately February, 2011, and continues to operate and do business, in good standing, through and including this date. FC/LW Vegas is or was a Delaware limited liability company registered to do business in the State of Nevada in February 2011 which has maintained registration through the present.

9. FC/LW VEGAS, LLC, on information and belief, is an entity jointly owned and operated by Liberman, Mitchell, LVLP, and non-party Forest City Enterprises, for purposes of developing and managing various real property interest in Southern Nevada.

10. In that context, various real property and ownership equity transfers took place between LVLP and/or FC/LW, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Aquarius Owner LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.

11. In that context, various real property and ownership equity transfers took place between LVLP and/or FC/LW, LLC during the operative time, and on information and belief, financial distributions and transactions occurred between

12. Aquarius, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents, is a Delaware limited liability that first registered to do business in Nevada in approximately February, 2011, and continues to operate and do business, in good standing, through and including this date.

13. In that context, various real property and ownership equity transfers took place between LVLP and/or Leah Property, LLC during the operative time, and on information and belief, financial distributions and transactions occurred between

14. Aquarius, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents, is a Delaware limited liability

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- that first registered to do business in Nevada in approximately February, 2011, and continues to operate and do business, in good standing, through and including this date.
15. Leah Property, LLC is a Delaware limited liability that first registered to do business in Southern Nevada in approximately February, 2005, and continued to be active and operate in the Southern Nevada area through and including February, 2015.
 16. On information and belief, Leah Property LLC is owned, managed, and operated by Liberman, at all relevant times.
 17. In that context, various real property and ownership equity transfers took place between LVLP and/or Leah Property, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Leah Property, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.
 18. In that context, various real property and ownership equity transfers took place between LVLP and/or Live Work, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Leah Property, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.
 19. Live Work LLC is a Delaware limited liability company who first became active in Southern Nevada in or about April, 2015, and in fact was a plaintiff in the original underlying lawsuit with LVLP versus the plaintiffs herein. Live Work, LLC, on information and belief, continued to be active and operating in Southern Nevada through and including approximately April, 2012.
 20. On information and belief, Live Work, LLC was owned, operated, and managed by Liberman, Mitchell, LVLP, Live Work Manager, LLC, and/or Mitchell Holdings, and was an active participant in various real property transactions involving non-party Forest City Enterprises.

21. In that context, various real property and ownership equity transfers took place between LVLP and/or Live Work, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Live Work, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.
22. In that context, various real property and ownership equity transfers took place between LVLP and/or Live Work, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Live Work Manager, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.
23. Livework Manager, LLC was a Delaware Limited Liability that first registered to do business in the State of Nevada in approximately April, 2005, and continued active and in business in Southern Nevada through approximately February, 2012.
24. Live Work Manager, LLC was owned, operated and managed by, on information and belief, by Liberman, Mitchell, and/or LVLP.
25. In that context, various real property and ownership equity transfers took place between LVLP and/or Live Work Manger, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Livework Manager, LLC and its principals on a recurring basis, most of which were In that context, various real property transfers and ownership equity took place between LVLP and/or Live Work, LLC during the operative time, and on information and belief, financial distributions and transactions occurred between Live Work, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents, is a Delaware limited liability that first registered to do business in Nevada in approximately February, 2011, and continues to operate and do business, in good standing, through and including this date. FC/LW Vegas is or was a Delaware limited liability company registered to do business in the State of Nevada in February 2011 which has maintained registration through the present.

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- 1 never disclosed in publicly available records or documents.
- 2 26. Zoe Property, LLC is a Delaware Limited Liability Company that first registered and
- 3 became active in Southern Nevada in or about November 2004, and in fact was one
- 4 of the original plaintiffs along with Live Work, LLC and LVLP versus the plaintiffs
- 5 herein. On information and belief, Zoe Property, LLC operated and continued to be
- 6 active in Southern Nevada through approximately November, 2007.
- 7 27. Zoe Property, LLC was owned, operated and managed by, on information and belief,
- 8 by Liberman, Mitchell, and/or LVLP.
- 9 28. In that context, various real property and ownership equity transfers took place
- 10 between LVLP and/or Zoe Property, LLC, during the operative time, and on
- 11 information and belief, financial distributions and transactions occurred between Zoe
- 12 Property, LLC and its principals on a recurring basis, most of which were never
- 13 disclosed in publicly available records or documents.
- 14 29. In that context, various real property and ownership equity transfers took place
- 15 between LVLP and/or Zoe Property, LLC, during the operative time, and on
- 16 information and belief, financial distributions and transactions occurred between Zoe
- 17 Property, LLC and its principals on a recurring basis, most of which were never
- 18 disclosed in publicly available records or documents.
- 19 30. Wink One, LLC is a Delaware limited liability company that registered to do business
- 20 in the State of Nevada in approximately April, 2008, and remained active, according
- 21 to Secretary of State records, through and including approximately April, 2009. Wink
- 22 One, LLC, on information and belief, was owned, operated and managed by
- 23 Liberman, Mitchell, and/or LVLP.
- 24 31. Wink One, LLC was owned, operated and managed by, on information and belief, by
- 25 Liberman, Mitchell, and/or LVLP.
- 26 32. In that context, various real property and ownership equity transfers took place
- 27 between LVLP and/or Wink One, LLC, during the operative time, and on information
- 28 and belief, financial distributions and transactions occurred between Wink One, LLC

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and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.

33. In that context, various real property and ownership equity transfers took place between LVLP and/or Wink One, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Wink One, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.

34. Casino Coolidge, LLC is a Delaware limited liability company that first registered to do business in Southern Nevada in or about October, 2014.

35. On information and belief, Casino Coolidge, LLC is owned, operated and managed by Liberman, Mitchell, LVLP, and/or LVLP..

36. In that context, various real property and ownership equity transfers took place between LVLP and/or Casino Coolidge, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Casino Coolidge, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents and continues to operate and be active in Southern Nevada through the present.

37. In that context, various real property and ownership equity transfers took place between LVLP and/or Casino Coolidge, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Casino Coolidge, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.

38. 305 Las Vegas, LLC is a Delaware limited liability company that first registered and qualified to do business in Southern Nevada in approximately April, 2007, and remains active and doing business in Southern Nevada through the present.

39. On information and belief, 305 Las Vegas, LLC was originally owned, operated and managed by Liberman, Mitchell, and/or LVLP.

40. In that context, various real property and ownership equity transfers took place

between LVLP and/or 305 Las Vegas, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between 305 Las Vegas, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents and continues to operate and be active in Southern Nevada through the present.

41. In that context, various real property and ownership equity transfers took place between LVLP and/or 305 Las Vegas, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between 305 Las Vegas, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents.

42. On information and belief, unbeknownst to Plaintiffs, in approximately 2012 305 Las Vegas, LLC engaged in an internal transaction resulting in the acquisition of the beneficial interest of Mitchell by a Mr. Win Churchill, and a monetary distribution benefitting Mitchell to the tune of \$7.5 million, all of which Plaintiff has only learned at very recent times.

43. On information and belief, MEYER PROPERTY, LTD., is fictitious entity that was involved for a relatively short period of time with LEAH PROPERTY, LLC, and in the context thereof participated in real estate transactions resulting in net financial gain to Leah and/or Liberman, Mitchell, and/or LVLP, the specifics of which financial gains were never disclosed nor reasonably discoverable by Plaintiffs herein.

44. In that context, various real property transfers took place between LVLP and/or Meyer Property, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Meyer Property, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents and continues to operate and be active in Southern Nevada through the present.

45. In that context, various real property transfers and ownership equity took place between LVLP and/or Meyer Property, LLC during the operative time, and on

1 information and belief, financial distributions and transactions occurred between
2 Meyer Property, LLC and its principals on a recurring basis, most of which were never
3 disclosed in publicly available records or documents, is a Delaware limited liability
4 that first registered to do business in Nevada in approximately February, 2011, and
5 continues to operate and do business, in good standing, through and including this
6 date. FC/LW Vegas is or was a Delaware limited liability company registered to do
7 business in the State of Nevada in February 2011 which has maintained registration
8 through the present.

9 46. On information and belief, Mitchell Holdings, LLC is a Delaware limited liability
10 company that never qualified to do business within the State of Nevada, but was used
11 by Defendant Mitchell for purposes of owning Mitchell's equity or beneficial interest
12 in various other defendants, and fuddling money back and forth between such entities,
13 in a matter that would not be detectable or readily discoverable by Plaintiffs or other
14 creditors.

15 47. In that context, various real property and ownership equity transfers took place
16 between LVLP and/or Mitchell Holdings, LLC during the operative time, and on
17 information and belief, financial distributions and transactions occurred between
18 Mitchell Holdings, LLC and its principals on a recurring basis, most of which were
19 never disclosed in publicly available records or documents, is a Delaware limited
20 liability that first registered to do business in Nevada in approximately February,
21 2011, and continues to operate and do business, in good standing, through and
22 including this date.

23 48. In that context, various real property transfers and ownership equity took place
24 between LVLP and/or Mitchell Holdings, LLC during the operative time, and on
25 information and belief, financial distributions and transactions occurred between
26 Mitchell Holdings, LLC and its principals on a recurring basis, most of which were
27 never disclosed in publicly available records or documents, is a Delaware limited
28 liability that first registered to do business in Nevada in approximately February,

1 2011, and continues to operate and do business, in good standing, through and
2 including this date. FC/LW Vegas is or was a Delaware limited liability company
3 registered to do business in the State of Nevada in February 2011 which has
4 maintained registration through the present.

5 49. On information and belief, Liberman Holdings, LLC is a Delaware limited liability
6 company that never qualified to do business within the State of Nevada, but was used
7 by Defendant Liberman Holdings, LLC for purposes of owning Liberman's equity or
8 beneficial interest in various other defendants, and fuddling money back and forth
9 between such entities, in a matter that would not be detectable or readily discoverable
10 by Plaintiffs or other creditors.

11 50. On information and belief, Liberman Holdings, LLC was owned and directed by
12 Mitchell, Liberman, and/or LVLP.

13 51. In that context, various real property and ownership equity transfers took place
14 between LVLP and/or Liberman Holdings, LLC during the operative time, and on
15 information and belief, financial distributions and transactions occurred between
16 Liberman and its principals on a recurring basis, most of which were never
17 disclosed in publicly available records or documents, is a Delaware limited liability
18 that first registered to do business in Nevada in approximately February, 2011, and
19 continues to operate and do business, in good standing, through and including this
20 date.

21 52. Live Works TIC Successor, LLC, on information and belief, is a fictitious entity in
22 which Liberman, Mitchell, and/or Las Vegas Land Holdings had substantial equity or
23 beneficial interest, and was the ultimate recipient of financial proceeds, monies,
24 emoluments and benefits deriving from Live Work LLC, and a tendency and common
25 agreement entered into between Live Work, LLC and non-party Forest City
26 Enterprises, through contractual and financial arrangements, referred to as the tenancy
27 in common agreement, and numerous subsequent amendments thereto.

28 53. In that context, various real property and ownership equity transfers took place

between LVLP and/or Live Works TIC Successor, LLC, during the operative time, and on information and belief, financial distributions and transactions occurred between Live Works TIC Successor, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents and continues to operate and be active in Southern Nevada through the present.

54. In that context, various real property and ownership equity transfers took place between LVLP and/or Live Works TIC Successor, LLC during the operative time, and on information and belief, financial distributions and transactions occurred between Live Works TIC Successor, LLC and its principals on a recurring basis, most of which were never disclosed in publicly available records or documents, is a Delaware limited liability that first registered to do business in Nevada in approximately February, 2011, and continues to operate and do business, in good standing, through and including this date.

55. Entity Defendants, MEYER PROPERTY, LTD.; ZOE PROPERTY, LLC; LEAH PROPERTY, LLC; WINK ONE, LLC; LIVE WORK, LLC; LIVE WORK MANAGER, LLC; AQUARIUS OWNER, LLC; LVLP HOLDINGS, LLC; MITCHELL HOLDINGS, LLC; LIEBERMAN HOLDINGS, LLC; 305 LAS VEGAS, LLC; LIVE WORKS TIC SUCCESSOR, LLC; FC/LIVE WORK VEGAS, LLC, are believed to be Delaware limited liability companies and/or corporations which have conducted business in the State of Nevada, and are alleged on information and belief to be owned and/or controlled by Defendants, LAS VEGAS LAND PARTNERS, LLC, DAVID MITCHELL and BARNET LIBERMAN.

56. LVLP, LLC, Mitchell, and Liberman, created the various Entity Defendants, LAS VEGAS LAND PARTNERS, LLC; MEYER PROPERTY, LTD.; ZOE PROPERTY, LLC; LEAH PROPERTY, LLC; WINK ONE, LLC; LIVE WORK, LLC; LIVE WORK MANAGER, LLC; AQUARIUS OWNER, LLC; LVLP HOLDINGS, LLC; MITCHELL HOLDINGS, LLC; LIEBERMAN HOLDINGS, LLC; 305 LAS VEGAS, LLC; LIVE WORKS TIC SUCCESSOR, LLC; FC/LIVE WORK VEGAS, LLC, on

information and belief, and used multiple sophisticated counsel for purposes of secreting, hiding, and conveying away valuable assets that were available to satisfy creditors such as Plaintiffs as alleged more specifically hereinafter (hereinafter referred to as the "Asset Protection Scheme").

57. That Plaintiffs do not at present know the true names and identities of those Entity Defendants, both corporate and individual, herein joined by fictitious names, but is informed and believes and therefore alleges that said Entity Defendants, are agents, employees, servants and representatives of the named Entity Defendants, or persons and entities acting in concert with the named Entity Defendants with respect to the premises herein plead, who are liable to the Plaintiffs by reason thereof, and the Plaintiffs pray leave to amend this Complaint to insert their true names and identities with appropriate allegations when the same becomes known.

58. Upon information and belief, part of the Asset Protection Scheme contemplated that the majority of the purported equity interests in the asset protection entities referred to two paragraphs above be held in the name of LAS VEGAS LAND PARTNERS, LLC, or an associated entity, all of which were and are in reality controlled by DAVID J. MITCHELL and BARNET LIBERMAN.

59. Upon information and belief, LAS VEGAS LAND PARTNERS, LLC received its equity interests in the asset protection entities gratuitously, or for wholly inadequate consideration.

60. Upon information and belief, LAS VEGAS LAND PARTNERS, LLC is the nominal holders of the alleged interests, in the entity defendants, and takes its direction from DAVID J. MITCHELL and BARNET LIBERMAN, in managing and operation in the asset protection entities, which exist merely to help Entity Defendants, LAS VEGAS LAND PARTNERS, LLC, DAVID J. MITCHELL and BARNET LIBERMAN protect the assets of LAS VEGAS LAND PARTNERS, LLC from judgment creditors such as Plaintiffs.

61. Plaintiff is informed and believes, that the Entity Defendants are the recipients of

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fraudulent transfers of real property, monies, and other valuable assets as hereinafter alleged.

62. Nype obtained a judgment against LVLP on or about April 10, 2015, and initiated post-judgment collection and discovery efforts during the Summer of 2015.

63. The first post-judgment discovery documentation received by NYPE were various tax returns and limited related information for LVLP, subsequently followed by various bank statements and financial ledger documentation, which production occurred from approximately late August, 2015 through and including November 2015.

64. Most of the documentation so produced was already stale dated even when produced, (for example, the bank statements only being current through early 2014, despite producing documentation in late 2015.

65. While the documentation produced in the latter half of 2015 disclosed some suspicious circumstances and questionable transactions, it became clear that substantial additional source documents would be required to flesh out and understand precisely what had occurred.

66. Based on a preliminary review of the newly disclosed bank statements and ledgers, it was noted that there was a comingling of funds related to various payments that appear to be made on behalf of other entities. Although not all of the canceled checks were provided, the bank statements of Las Vegas Land Partners, LLC located at Bates LVLP01-00001 to LVLP 08-00016 are indicative of usage by numerous related party entities. An example of the comingling can be found at LVLP 07-00047, more specifically checks number 1287, 1288 and 1289 payable to the Clark County Treasurer for parcels that do not appear to be recorded in the name of Las Vegas Land Partners, LLC and LVLP07-00048 more specifically checks number 1292 and 1293 payable to Delaware Secretary of State to register other entities.

67. Documents provided by Las Vegas Land Partners, LLC consisting of a simple check register covering the period 1/13/11 to 4/27/15 also supports that conclusion with the same date, payee and dollar amount information found on the checks.

68. A review of the full tax returns of LVLP Holdings, LLC provided at Bates LVLP09-00001 to LVLP17-0064 Forms 1065 for calendar years 2005 to 2013 was first possible in the late fall of 2015 as well. The tax returns are indicative of a combination and consolidation of several related party Limited Liability Companies.
69. The organizational documents located at Bates LVLP18-00001 to LVLP19-00202 indicate that Las Vegas Land Partners, LLC is the single equity member of Wink One, LLC and Livework Manager, LLC (who is the sole equity member of Livework, LLC).
70. The members of Las Vegas Land Partners, LLC are Barnet Liberman and David Mitchell (Bates LVLP19-00033-35).
71. There is no explanation for the usage of "LVLP Holdings, LLC" as the filing entity for the tax returns. There are numerous real estate parcels, equity interests and sources of income arising from the various consolidated entities listed on the tax returns of LVLP Holdings, LLC that are not traceable to the ledgers provided by Las Vegas Land Partners, LLC.
72. Additionally there are numerous known sources of cash flow for example arising from Wink One, LLC related to the RTC Lease that are not traceable to the accounting records.
73. During the Summer of 2016, NYPE again promulgated detailed specific written discovery requests to LVLP, which requests were partially complied with in the form of additional tax returns and ledger documentation, but mostly objected to.
74. NYPE found it necessary to file a Motion to Compel discovery, and an Order resulting from many months of contested discovery disputes was finally entered by the Court on or about February 2, 2017.
75. A substantial volume of additional documentation was ultimately produced, after repeated efforts by NYPE, which disclosed additional improprieties, misconduct, and transactions by LVLP and its principals designed to effectively render LVLP insolvent

28 ...

- 1 and unable to respond in damages, which transactions will be discussed, in part,
2 hereinafter.
- 3 76. To date, however, the Order Compelling Discovery of February 2, 2017 has only been
4 partially complied with and there remain substantial deficiencies and blocks of
5 documentation that could and should have been produced, but was not. NYPE intends
6 to seek the missing documentation and discovery information required to fully flesh
7 out NYPE's allegations and complaint through supplemental discovery proceedings
8 in the original case, as well as through discovery activity in this newer case.
- 9 77. Even the documents produced from January through March, 2017, are inherently
10 contradictory and do not match the data reported on the tax returns.
- 11 78. As one key example, however, of the importance of having accurate and complete
12 source records, attached hereto as Exhibit "1" and by this reference incorporated
13 herein is a certification by LVLP's New Jersey CPA for the first time disclosing that
14 various affiliated and associated entities are disregarded for tax and accounting
15 purposes, and are all reported through LVLP Holdings, LLC's business tax return.
- 16 79. The partial and incomplete documentation produced in both the fall of 2015, and
17 2017, does show extensive co-mingling, a failure to keep separate and adequate
18 accounting records for various affiliates and associated companies, a decided lack of
19 concrete detail, and an absolute failure to account for and explain various cash flow
20 entries.
- 21 80. Gain the incomplete documentation produced to date, Plaintiff is unable to
22 determine where LVLP's cash flow is coming from, or where the resulting cash flow
23 is being applied.
- 24 81. On information and belief, the documentation available shows that LVLP, its
25 affiliates and associated entities are shifting money between one entity and the other
26 to pay bills and cover expenses as needed, and not in any coherent or recurring logical
27 form.
28

- 1 82. The data that has been provided does not match LVLP tax returns, for example
2 failing to disclose substantial income.
3
4 83. Part of the data provided appears to account for, in part, the financial transactions
5 and relationship between LVLP and its joint venture partner (the entity which Nype
6 procured to provide financing for LVLP's projects), Forest City Enterprises.
7
8 84. The data available to date appears to show that arrangements were made with
9 Forest City to utilize LVLP's share of revenue and cash flow to reduce debt and build
10 equity, resulting in an absence of actual cash receipt by LVLP.
11
12 85. Despite what those records are showing, however, the tax returns are wholly silent
13 and fail to disclose the accrual of any imputed income or equity with respect to the
14 Forest City Joint Ventures, despite the fact that the joint venture documents suggest
15 that LVLP's share of revenue is being used to pay down debt and build equity, which
16 would legally result in the accrual of taxable income which the law requires to be
17 accurately reported .
18
19 86. Indeed, until the preliminary information was received in the Fall of 2015 as
20 supplemented by the early 2017 production, LVLP, based on the tax returns and
21 documentation it had previously supplied, continued to operate, appeared to have
22 assets, appeared to be paying taxes as accrued, and continued to vigorously defend
23 itself.
24
25 87. One particular item first disclosed in the late Winter of 2017 is a statement by the
26 acknowledged accountant for LVLP that numerous of the other defendant entities
27 herein are "disregarded for tax purposes", meaning, on information and belief, that
28 their revenue and expenses, as well as income and liabilities, while being nominally
contained in a separate legal entity, are a practical matter, and as recognized by
Federal Taxing Authorities, one and the same as LVLP.
88. Additional discovery information fleshed out in 2016 and early 2017 includes the fact
that LVLP is at the present time effectively insolvent, despite showing millions of

dollars of networth on its tax returns, and has been forced to pay its attorneys in both the prior litigation and the present litigation through personal checks and credit cards of Mitchell and/or Liberman, or through affiliate entities.

89. Much of the newly received financial data also discloses that corporate filing fees for numerous of the defendants herein had been paid, *ad hoc*, from LVLP bank accounts, interchangeably, despite said entities nominally maintaining or claiming separate legal status.
90. Plaintiffs RUSSELL L. NYPE and the REVENUE PLUS, LLC (hereinafter collectively referred to as "Nype") were Defendants in a case originally initiated by current Defendants, LAS VEGAS LAND PARTNERS, LLC, LIVE WORK, LLC and ZOE PROPERTIES, LLC in the Eighth Judicial District Court in Clark County, Nevada under Case No. A551073, which case commenced on or about November 2, 2007 (hereinafter the "First Case").
91. Nype counterclaimed in that case with regard to his prior business dealings with LAS VEGAS LAND PARTNERS, LLC, its associate entities, and its principals, BARNET LIBERMAN (hereinafter "Liberman") and DAVID J. MITCHELL (hereinafter "Mitchell"), seeking compensation which he had been promised and which he had earned during the course of the parties ongoing business dealings regarding the development of numerous Las Vegas real estate holdings.
92. On information and belief, during the pendency of those proceedings, and after defaulting on their obligations to Nype, Liberman and Mitchell undertook the process of creating various affiliated and associate entities, including but not limited to several of the asset protection entities alleged hereinabove, utilizing sophisticated corporate and asset protection counsel.
93. After years of protracted litigation, Nype ultimately obtained a judgment against LAS VEGAS LAND PARTNERS, LLC on or about April 10, 2015 in the principal amount of \$2,608,797.50.

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94. As alleged hereinabove, upon information and belief, pursuant to the Asset Protection Scheme, on various dates spanning 2007 through the present, Defendant LAS VEGAS LAND PARTNERS, LLC commenced multiple real property and equity ownership transfers to convey its valuable property interests, to one or more the asset protection entities which asset protection entities continue to hold the subject property or which have subsequently transferred such to additional entities in which Liberman, Mitchell, and or LVLV hold substantial beneficial interests.
95. In addition to the numerous real property conveyances alleged hereinabove, and totally unbeknownst to Nype at the time LAS VEGAS LAND PARTNERS, LLC transferred literally millions of dollars in monies and liquidated funds to its principals, LIBERMAN and MITCHELL, during a time that LAS VEGAS LAND PARTNERS, LLC, knew or reasonably should have known of Nype's substantial monetary claims against it.
96. The real estate and monetary transfers alleged hereinabove effectively rendered LAS VEGAS LAND PARTNERS insolvent, and unable to pay its debts on a regular basis as they matured, including but not limited to the monies that the Eighth Judicial District Court has determined are owed to Nype.
97. Upon information and belief, the aforesaid actions of all Defendants were undertaken consciously, knowingly, willfully, and specifically in an effort to defeat and avoid Plaintiff's rights which were being pursued in the First Case.
98. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LIBERMAN AND MITCHELL** were and are the alter ego of LAS VEGAS LAND PARTNERS, LLC, that said Defendant did and still does dominate, influence and control of LAS VEGAS LAND PARTNERS, LLC, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework

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which LAS VEGAS LAND PARTNERS, LLC used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of LAS VEGAS LAND PARTNERS, LLC entity is not disregarded and the said Defendant held liable for all relief being caught herein.

99. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **MEYER PROPERTY, LLC** was and is the alter ego of MEYER PROPERTY, LLC, that said Defendants did and still do dominate, influence and control of MEYER PROPERTY, LLC, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which LAS VEGAS LAND PARTNERS, LLC, MITCHELL and LIBERMAN used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of MEYER PROPERTY, LLC entity is not disregarded and the said Defendant held liable for all relief being caught herein.

100. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS, LLC, LIBERMAN and MITCHELL** were and are the alter ego of ZOE PROPERTY, LLC, that said Defendants did and still do dominate, influence and control of **ZOE PROPERTY, LLC**, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which LAS VEGAS LAND PARTNERS, LLC, MITCHELL and LIBERMAN used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff

will result if the theoretical separateness of **ZOE PROPERTY, LLC** entity is not disregarded and the said Defendant held liable for all relief being caught herein.

101. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS, LLC, LIBERMAN and MITCHELL** were and are the alter ego of **LEAH PROPERTY, LLC**, that said Defendants did and still do dominate, influence and control of **LEAH PROPERTY, LLC**, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **LAS VEGAS LAND PARTNERS, LLC, MITCHELL and LIBERMAN** use and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of **LEAH PROPERTY, LLC**, if entity is not disregarded and the said Defendant held liable for all relief being caught herein.

102. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS, LLC** were and are the alter ego of **WINK ONE, LLC**, that said Defendant did and still does dominate, influence and control of **LAS VEGAS LAND PARTNERS, LLC**, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **WINK ONE, LLC** used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of **WINK ONE, LLC** if entity is not disregarded and the said Defendant held liable for all relief being caught herein

103. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS,**

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1 LLC were and are the alter ego of **LIVE WORK, LLC**, that said Defendant did and
 2 still does dominate, influence and control of **LAS VEGAS LAND PARTNERS, LLC**,
 3 that there existed and still exists a unity of ownership between them; that the
 4 individuality and separateness of each entity was and remains non-existent; that each
 5 such entity was and remains a mere shell and naked framework which **LIVE WORK,**
 6 **LLC** used and still use to conduct their business affairs; that each such entity is and
 7 remains inadequately capitalized; and that an injustice and fraud upon

8
 9 104. Plaintiff will result if the theoretical separateness of **LIVE WORK, LLC** if entity is
 10 not disregarded and the said Defendant held liable for all relief being caught herein.

11 105. Upon information and belief, Plaintiff is informed and believes and thereon alleges
 12 that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS,**
 13 **LLC** were and are the alter ego of **LIVE WORK MANAGER, LLC**, that said
 14 Defendant did and still does dominate, influence and control of **LAS VEGAS LAND**
 15 **PARTNERS, LLC**, that there existed and still exists a unity of ownership between
 16 them; that the individuality and separateness of each entity was and remains non-
 17 existent; that each such entity was and remains a mere shell and naked framework
 18 which **LIVE WORK MANAGER, LLC** used and still use to conduct their business
 19 affairs; that each such entity is and remains inadequately capitalized; and that an
 20 injustice and fraud upon Plaintiff will result if the theoretical separateness of **LIVE**
 21 **WORK MANAGER, LLC** entity is not disregarded and the said Defendant held
 22 liable for all relief being caught herein.

23 106. Upon information and belief, Plaintiff is informed and believes and thereon alleges
 24 that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS,**
 25 **LLC**, was and are the alter ego of **AQUARIUS OWNER, LLC**, that said Defendant
 26 did and still does dominate, influence and control of **LAS VEGAS LAND**
 27 **PARTNERS, LLC**, that there existed and still exists a unity of ownership between
 28 them; that the individuality and separateness of each entity was and remains non-

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existent; that each such entity was and remains a mere shell and naked framework which **AQUARIUS OWNER, LLC** used and still use to conduct their business affairs; that each such entity remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of **AQUARIUS OWNER, LLC** entity is not disregarded and the said Defendant held liable for all relief being caught herein.

107. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS, LLC** were and are the alter ego of **LVLP HOLDINGS, LLC**, that said Defendant did and still does dominate, influence and control of **LAS VEGAS LAND PARTNERS, LLC**, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **LVLP HOLDINGS, LLC** used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of **LVLP HOLDINGS, LLC** entity is not disregarded and the said Defendant held liable for all relief being caught herein.

108. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS, LLC**, were and are the alter ego of **MITCHELL HOLDINGS, LLC**, that said Defendant did and still does dominate, influence and control of **LAS VEGAS LAND PARTNERS, LLC**, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **MITCHELL HOLDINGS, LLC** used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness

MITCHELL HOLDINGS, LLC entity is not disregarded and the said Defendant held liable for all relief being caught herein.

109. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS, LLC** were and are the alter ego of **LIEBERMAN HOLDINGS, LLC**, that said Defendant did and still does dominate, influence and control of **LAS VEGAS LAND PARTNERS, LLC**, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **MITCHELL HOLDINGS, LLC**, used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of **MITCHELL HOLDINGS, LLC** entity is not disregarded and the said Defendant held liable for all relief being caught herein.

110. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, **LAS VEGAS LAND PARTNERS, LLC**, were and are the alter ego of **305 LAS VEGAS, LLC**, that said Defendant did and still does dominate, influence and control of **LAS VEGAS LAND PARTNERS, LLC**, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **305 LAS VEGAS, LLC**, used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of **LAS VEGAS LAND PARTNERS, LLC** entity is not disregarded and the said Defendant held liable for all relief being caught herein.

111. Upon information and belief, Plaintiff is informed and believes and thereon alleges

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that at all times herein mentioned Defendants, LAS VEGAS LAND PARTNERS, LLC, was and are the alter ego of **LIVE WORKS TIC SUCCESSOR, LLC**, that said Defendant did and still does dominate, influence and control of LAS VEGAS LAND PARTNERS, LLC, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **LIVE WORKS TIC SUCCESSOR, LLC** used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of LAS VEGAS LAND PARTNERS, LLC entity is not disregarded and the said Defendant held liable for all relief being caught herein.

112. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, LAS VEGAS LAND PARTNERS, LLC, were and are the alter ego of **FC/LIVE WORK VEGAS, LLC**, that said Defendant did and still does dominate, influence and control of LAS VEGAS LAND PARTNERS, LLC, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **FC/LIVE WORK VEGAS, LLC** used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of LAS VEGAS LAND PARTNERS, LLC entity is not disregarded and the said Defendant held liable for all relief being caught herein.

113. Upon information and belief, Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Defendants, LAS VEGAS LAND PARTNERS, LLC, were and are the alter ego of **CASINO COOLIDGE, LLC**, that said Defendant did and still does dominate, influence and control of LAS VEGAS LAND

PARTNERS, LLC, that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which **CASINO COOLIDGE, LLC** used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of LAS VEGAS LAND PARTNERS, LLC entity is not disregarded and the said Defendant held liable for all relief being caught herein.

114. This New Case is effectively an extension and development of the first litigation, and is an effort by Plaintiffs to avoid the wrongful misconduct of Defendants and each of them, in attempting to avoid NYPE's creditor rights and protect the assets of LAS VEGAS LAND PARTNERS, LLC, which were, are, and should be available to satisfy Plaintiff's claims.

FIRST CLAIM FOR RELIEF

(Constructive Trust)

115. Plaintiff incorporates by reference paragraphs 1 through 114 as though fully set forth.
116. Pursuant to the pending litigation in the First Case, it was understood that options or equity in various Real Estate parcels owned by LAS VEGAS LAND PARTNERS, LLC in or about 2006, as well as "Choses In Action" such as equity ownership in various affiliated entities, would be available to satisfy Plaintiff's judgment.
117. Defendants knew or reasonably should have known, that the subject property interests were valuable, and that the legitimate equity in the subject real property or beneficial ownership of the affiliate entities and limited liability ownership interest would be sufficient to satisfy Nype's claim, but for the fraudulent conveyances alleged herein.
118. Defendants transferred, hypothecated and encumbered the various property for improper purposes and inadequate consideration.

119. All of the foregoing facts make it just and equitable that this court impose and declare a constructive trust upon the subject property interests, and any proceeds therefrom, in favor of Plaintiffs.

120. The court can and should declare a lien against the subject properties, order the sale thereof, and/or order the payment of all rents or monies received from the subject property to Plaintiffs herein.

121. It has been necessary for Plaintiff to retain the services of an attorney to prosecute this action and Plaintiff is therefore entitled to an award of reasonable attorneys' fees

SECOND CLAIM FOR RELIEF

(Fraudulent Conveyance)

122. Plaintiff incorporates by reference paragraphs 1 through 121 as though fully set forth.

123. Plaintiff is informed and believes, and on that basis alleges that Defendants have taken numerous actions to avoid satisfying Plaintiff's claims against LAS VEGAS LAND PARTNERS, LLC.

124. Plaintiff alleges on information and belief that in order to avoid potential execution against real estate interests, *inter alia*, Defendants, LAS VEGAS LAND PARTNERS, LLC took steps to hypothecate and transfer said property interests and cash to the other Defendants herein.

125. Plaintiff is informed and believes, and on that basis alleges that such transfers by Defendants were undertaken in an effort to avoid the adverse financial consequences of Plaintiff's pending claims, as well as those of other creditors.

126. Plaintiff is informed and believes, and on that basis alleges that the aforementioned transfers were gratuitous, or for inadequate or disguised consideration, made without obligation, and made with an intent to deprive Plaintiff of its ability to recover such funds directly from LAS VEGAS LAND PARTNERS, LLC in connection with the monies owed to Plaintiff.

127. As a result of the aforementioned acts of Defendants, Plaintiff is entitled to a

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- 1 Judgment against them, jointly and severally, in an amount in excess of \$10,000.00.
- 2
- 3 128. On or about August 14, 2015, during the course of proceedings initiated to enforce
- 4 and collect upon the judgment in the First Case, Defendant LAS VEGAS LAND
- 5 PARTNERS, LLC first provided tax returns and detail financial information which
- 6 revealed to Nype, for the first time, that it had transferred its beneficial interest in
- 7 numerous real estate parcels, and in the equity of its affiliates, as well as many
- 8 millions of dollars, to the entity defendants and/or Liberman and Mitchell, during the
- 9 ongoing pendency of the first case. In making such transfers, Defendants LAS
- 10 VEGAS LAND PARTNERS, LLC, MITCHELL and LIBERMAN have acted with
- 11 the actual intent to hinder delay and to defraud their creditors, including Nype, but
- 12 fraudulently transferring assets to insiders and the entity defendants.
- 13
- 14 129. Nype lacks an adequate remedy at law because, unless the relief sought in this
- 15 complaint is granted, LAS VEGAS LAND PARTNERS, LLC with the aid of
- 16 the other Defendants will have succeeded in fraudulently transferring its assets to
- 17 insiders and/or related entities, depriving Nype of the opportunity to collect upon the
- 18 judgment, and we see what is due and owing from LAS VEGAS LAND PARTNERS,
- 19 LLC.
- 20
- 21 130. Nype has an high probability of success on the merits in this action.
- 22
- 23 131. The aforesaid transfer of assets to insiders and/or the entity defendants was made with
- 24 actual intent to hinder, delay or defraud creditors, most significantly Nype, and these
- 25 transfers therefore constitute fraudulent transfers in violation of NRS 112.180.
- 26
- 27 132. LAS VEGAS LAND PARTNERS, LLC did not receive reasonably equivalent value
- 28 for the transfers herein alleged.
133. Defendant, LAS VEGAS LAND PARTNERS, LLC intended to incur or reasonably should have believed they would incur debts beyond its ability to pay the same as they become due, and thus the transfers at issue are far from transfers in violation of Nevada law.

134. Because of the special circumstances of this case, in which LAS VEGAS LAND PARTNERS, LLC is liable for a judgment it has consistently ignored and avoided, having committed fraud to avoid the judgment and their debts to Nype, and the hiding assets and also constituting a risk of further affirmative frustration of valid efforts by Nype to collect upon his judgment, Nype is entitled to:

- (1) The appointment of receiver to take possession of the assets of LVLP, LLC;
- (2) An injunction against further dissipation, disposition, or assignment of any and all assets and property owned by LAS VEGAS LAND PARTNERS, LLC;
- (3) Any other relief that the circumstances may require, including a declaration that the transfers in question are void, and that the assets in question are subject to execution by Nype.

135. It has been necessary for Plaintiff to retain the services of an attorney to prosecute this action, and Plaintiff is, therefore, entitled to reasonable attorneys' fees.

THIRD CLAIM FOR RELIEF

(Civil Conspiracy)

136. Plaintiff incorporates by reference paragraphs 1 through 135 as though fully set forth.

137. As alleged hereinabove, and upon information and belief, the transfer of the subject real estate and equity ownership interests and substantial monetary amounts were undertaken by Defendants with full knowledge as to the relevant circumstances and in an effort to participate in transactions in derogation of the rights of Plaintiff.

138. The knowing and willful conduct of the entity Defendants in agreeing to receive the subject real property and act as a nominee for said LAS VEGAS LAND PARTNERS, LLC, LIBERMAN and MITCHELL constitute acts of civil conspiracy.

139. The Defendants, and each of them worked together in concerted actions with the intent to accomplish an unlawful purpose, vis a vis Plaintiff.

- 1 140. The purpose of the unlawful, concerted actions of Defendants was intended to, or
- 2 would likely result in direct harm to Plaintiff.
- 3 141. As a direct and proximate result of the aforesaid civil conspiracy, undertaken
- 4 between the Defendants, Plaintiff has been damaged in an amount in excess of
- 5 \$10,000.00.
- 6 142. As alleged hereinabove, upon information and belief, Defendants' conduct was
- 7 willful, knowing, intentional, and malicious, as a matter of law, entitling Plaintiff to
- 8 recover exemplary damages in an amount in excess of \$10,000.00.
- 9 143. That it has been necessary for Plaintiff to retain the services of an attorney to
- 10 prosecute this action, and Plaintiff is therefore entitled to reasonable attorneys' fees.
- 11

FOURTH CLAIM FOR RELIEF

(Declaratory Relief)

- 12 144. Plaintiff incorporates by references Paragraphs 1 through 143 as though fully set
- 13 forth herein.
- 14 145. A true and ripe controversy exists as to the dispute, and declaratory relief pursuant
- 15 to NRS 30.040 is necessary to declare the respective rights, responsibilities, and
- 16 obligations between the parties as a consequence of Plaintiff's judgment against LAS
- 17 VEGAS LAND PARTNERS, LLC, and as relates to the various transactions
- 18 undertaken by Defendants, including but not limited to transactions involving various
- 19 parcels of valuable Las Vegas Real Estate and the transfer of valuable equity
- 20 ownership interests as regards LVLP's affiliated entities.
- 21 146. For all of the reasons set forth hereinabove, Defendants have acted wrongfully and
- 22 in violation of Plaintiffs rights as a Creditor, and a direct declaration as to the
- 23 invalidity of Defendants' transfers, and the viability of Plaintiff's Judgment Lien
- 24 against real estate as a priority lien (subject only to legitimate preexisting senior
- 25 encumbrance), and as a valid perfected security interest as regards valuable personal
- 26 property interests is appropriate, and should be determined and declared by the court.
- 27
- 28

147. That it has been necessary for the Plaintiff to retain the services of an attorney to prosecute this action and plaintiff is therefore entitled to reasonable attorneys fees.

FIFTH CLAIM FOR RELIEF

(Alter Ego)

148. Plaintiff incorporates by references Paragraphs 1 through 147 As though fully set forth herein.

149. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned, Defendants, DAVID J. MITCHELL; BARNET LIBERMAN; LAS VEGAS LAND PARTNERS, LLC; MEYER PROPERTY, LTD.; ZOE PROPERTY, LLC; LEAH PROPERTY, LLC; WINK ONE, LLC; LIVE WORK, LLC; LIVE WORK MANAGER, LLC; AQUARIAS OWNER, LLC; LVLP HOLDINGS, LLC; MITCHELL HOLDINGS, LLC; LIEBERMAN HOLDINGS, LLC; 305 LAS VEGAS LLC; LIVE WORKS TIC SUCCESSOR, LLC; FC/LIVE WORK VEGAS, LLC, CASINO COOLIDGE, LLC, and each of them, were and remain the alter-egos of each other; that said Defendants did and still do dominate, influence and control each other; that there existed and still exists a unity of ownership between them; that the individuality and separateness of each entity was and remains non-existent; that each such entity was and remains a mere shell and naked framework which the other Defendants used and still use to conduct their business affairs; that each such entity is and remains inadequately capitalized; and that an injustice and fraud upon Plaintiff will result if the theoretical separateness of the Defendant entities is not disregarded and each such Defendant held liable for all relief being sought herein.

150. Upon information and belief, to the extent that one or more of the Defendant entities is nominally owned or operated by or through LAS VEGAS LAND PARTNERS, LIBERMAN or MITCHELL with respect to one or more of the Defendant entities, which entities as a practical matter exist with functional unity of ownership in said Defendants, LAS VEGAS LAND PARTNERS, LIBERMAN or

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MITCHELL, the true and factual individuality and separateness of each such entity was and remains non-existent; each such entity was and remains a mere shell and naked framework, which Defendants LAS VEGAS LAND PARTNERS, LIBERMAN or MITCHELL utilize, through the offices of said Defendants LAS VEGAS LAND PARTNERS, LIBERMAN or MITCHELL and/or through nominees and others to conduct their business affairs. Each such entity is, upon information and belief, merely another nominal manifestation of the business and financial affairs of Defendants LAS VEGAS LAND PARTNERS, LIBERMAN or MITCHELL, and to recognize any such separate entity would work as separate and distinct from Defendants LAS VEGAS LAND PARTNERS, LIBERMAN or MITCHELL, an injustice and fraud upon Plaintiff, to the extent the theoretical or putative separateness of such entity is not disregarded and said nominal Defendants held liable for all the relief being sought herein.

151. As a matter of both statutory common law, and prior declarations of the Eighth Judicial District Court, it is appropriate that the Court further determine and declare that all of the aforesaid entities be held to be the Alter Egos of Defendants LAS VEGAS LAND PARTNERS, LIBERMAN or MITCHELL, and that therefore the various Defendants named herein can and should be jointly and severely liable to the Plaintiff with regard to all claims asserted.

152. That it has been necessary for the Plaintiff to retain the services of an attorney to prosecute this action and plaintiff is therefore entitled to reasonable attorneys fees.

WHEREFORE, Plaintiff prays for judgment against Defendants and each of them as follows:

1. For a sum in excess of \$10,000.00;
2. For exemplary damages in an amount in excess of \$10,000.00;
3. For the imposition of a constructive trust upon the various parcels of real property and valuable equity ownership interests formerly owned by LAS VEGAS LAND

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- 1 PARTNERS, LLC for the benefit of Plaintiff;
- 2
- 3 4. For an order requiring the sale of the parcels of real estate and valuable ownership
- 4 interest and an order directing the payment of all rents with regard to the subject real
- 5 property be made to the order of Plaintiff herein;
- 6 5. For the Appointment of a Receiver;
- 7 6. For interest upon all damages which Plaintiff recovers at the Nevada Statutory rate.
- 8 7. For a declaration as to the invalidity of Defendants' transactions as regards to the
- 9 various valuable real estate interests and equity ownership interests formerly owned
- 10 by LAS VEGAS LAND PARTNERS, LLC, and a further declaration that Plaintiff's
- 11 Judgment Lien is valid and stands as a priority lien, subject only to legitimate senior
- 12 encumbrances.
- 13 7. For a determination that the Defendants are the alter egos of each other , and should
- 14 all be held liable to Plaintiff, jointly and severally, for the damages sought herein.
- 15 8. The actions by Defendant, LAS VEGAS LAND PARTNERS, LLC, in conjunction
- 16 with the other Defendants, to convey valuable property and monies to other
- 17 Defendants with the intent to deprive Plaintiff of its ability to recover funds was
- 18 undertaking in a knowing, willful, intentional, and malicious manner, which under
- 19 Nevada law constitute malice and is sufficient grounds to invoke the availability of
- 20 exemplary damages against Defendants, and each of them.
- 21 9. As a consequence of the willful malicious and intentional misconduct of the
- 22 Defendants and each of them, Nype is entitled to recover exemplary damages from
- 23 each Defendant in accordance with Nevada Law, in an amount in excess of
- 24 \$10,000.00, the precise amount to be proven at time of trial;
- 25
- 26
- 27
- 28

10. For reasonable attorneys' fees for the prosecution of this suit; and
11. For such other and further relief as the Court may deem just and proper.

DATED this 21st day of August, 2017.

JOHN W. MUIJE & ASSOCIATES

By: 

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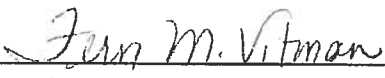
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of JOHN W. MUIJE & ASSOCIATES, and that on the 31ST day of August, 2017, I caused to be served a true and correct copy of the foregoing **FIRST AMENDED COMPLAINT FOR: (1) CONSTRUCTIVE TRUST; (2) FRAUDULENT CONVEYANCE; (3) CONSPIRACY TO DEFRAUD; (4) DECLARATORY RELIEF; AND (5) ALTER EGO**, in the following manner:

- ☐ by placing a copy of the same for mailing in the United States mail, with first class postage prepaid addressed as follows; and/or
- ☒ by electronically filing with the Clerk of the Court via the Odyssey E-File and Serve System;
- ☐ by placing a copy of the same for mailing in the United States mail, with first class postage prepaid marked certified return receipt requested addressed as follows: via facsimile at the facsimile number listed below; and/or
- ☐ pursuant to EDCR 7.26, by causing a copy to be sent via facsimile at the number(s) listed below; and/or
- ☐ by hand-delivering a copy to the party or parties as listed below:

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 An employee of JOHN W. MUIJE & ASSOCIATES

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EXHIBIT B

EXHIBIT B

FILED

MAR 20 2018

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:) BAP No. NV-17-1200-BHTa
CAPRIATI CONSTRUCTION)
CORPORATION, INC.,) Bk. No. 2:15-BK-15722-ABL
Debtor.)
_____)
CAPRIATI CONSTRUCTION)
CORPORATION, INC.,)
Appellant,)
v.) **AMENDED MEMORANDUM¹**
SPER, INC.,)
Appellee.)
_____)

Argued and Submitted on December 1, 2017,
at Las Vegas, Nevada

Filed - March 20, 2018

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable August B. Landis, Bankruptcy Judge, Presiding

Appearances: Aj Kung argued for appellant Capriati Construction
Corporation, Inc.; H. Stan Johnson of Cohen-
Johnson, LLC argued for appellee SPER, Inc.

Before: BRAND, HOULE² and TAYLOR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.

² Hon. Mark D. Houle, Bankruptcy Judge for the Central District of California, sitting by designation.

1 Reorganized debtor Capriati Construction Corp., Inc. appeals
2 an order denying its motion for contempt against SPER, Inc., for
3 SPER's alleged violations of the automatic stay and discharge
4 and/or plan injunction. Capriati alleged that the fraudulent
5 transfer and alter ego claims SPER was prosecuting in state court
6 against the non-debtor principal of Capriati were property of
7 Capriati's bankruptcy estate or of the reorganized debtor;
8 therefore, SPER's pursuit of those claims prior to confirmation of
9 Capriati's chapter 11³ plan violated the automatic stay and
10 violated the discharge and/or plan injunction once Capriati's plan
11 was confirmed. Capriati also appeals the court's order denying
12 reconsideration. We VACATE and REMAND.

13 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

14 A. The parties

15 Capriati is a construction company that historically
16 generated average annual income of \$55-\$65 million, primarily from
17 public work projects. The recent recession ultimately led
18 Capriati to file for bankruptcy relief. David Rocchio, Sr. is the
19 owner, sole shareholder and person in control of Capriati.

20 SPER is a corporate entity owned by Susan Frankewich, Esq.,
21 through which she conducts her law practice. Frankewich has
22 practiced bankruptcy law for over 30 years. Frankewich was the
23 attorney for Rocchio and his various entities from 2003 to mid
24 2015. Rocchio did not sign any retention agreements with
25 SPER/Frankewich individually and was not a guarantor for any

26
27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 unpaid legal fees owed by his various entities, including
2 Capriati.

3 **B. Capriati's bankruptcy filing, the state court action and the**
4 **chapter 11 plan**

5 Capriati filed its chapter 11 bankruptcy case on October 7,
6 2015. The court subsequently approved Capriati's application to
7 employ Kung & Brown as its bankruptcy counsel. SPER later filed
8 an unsecured proof of claim for Capriati's unpaid legal fees of
9 \$109,459.50.

10 One week later, SPER, represented by Frankewich, sued Rocchio
11 and his entities in state court for Capriati's unpaid legal fees,
12 alleging breach of contract, monies owed, quantum meruit,
13 misrepresentation, alter ego, and fraudulent transfer. SPER did
14 not name Capriati as a defendant, but SPER's claims for alter ego
15 and fraudulent transfer alleged that Rocchio (and the other
16 defendants) manipulated and transferred assets and funds between
17 Capriati and themselves to avoid payment of creditors, including
18 SPER. SPER requested that Rocchio be declared the alter ego of
19 Capriati and be held liable for any judgment.

20 Rocchio retained Capriati's bankruptcy counsel, Kung & Brown,
21 to file a motion to dismiss the state court action as to all
22 defendants. Rocchio argued that, because SPER's fraudulent
23 transfer claim alleged that Capriati fraudulently conveyed assets
24 prior to its filing bankruptcy, such claim had to be heard by the
25 bankruptcy court. In opposition to SPER's later summary judgment
26 motion, Rocchio argued that SPER could not recover Capriati's debt
27 from him or his entities under an alter ego theory, because
28 Capriati had to be named as a necessary and indispensable party

1 but could not be due to the bankruptcy stay. Rocchio also argued
2 that, to the extent any alleged transfers from Capriati to Rocchio
3 were avoidable, they would be reclaimed as property of Capriati's
4 bankruptcy estate; thus, SPER was impermissibly seeking recovery
5 against property of the estate.

6 Kung & Brown thereafter filed a supplement to its employment
7 application, disclosing to the bankruptcy court that the firm had
8 represented Rocchio in the state court action. Kung & Brown
9 asserted that its limited representation of Rocchio and his
10 entities did not create a conflict of interest in Capriati's
11 pending bankruptcy but rather preserved estate assets and
12 prevented further violation of the automatic stay. Kung & Brown
13 maintained that any alleged claims of alter ego and fraudulent
14 transfers by Capriati to Rocchio and his entities were claims
15 belonging to Capriati's bankruptcy estate, and so the firm had to
16 act quickly to ensure that SPER did not usurp estate assets. Both
17 Kung & Brown and Rocchio represented that Rocchio had no adverse
18 interests to the Capriati estate.

19 Capriati filed various reorganization plans and disclosure
20 statements. SPER was the only party to oppose confirmation of
21 Capriati's third amended plan of reorganization, which ultimately
22 became the confirmed plan ("Plan"). In each of its objections to
23 Capriati's disclosure statements, proposed plans and Plan
24 confirmation, SPER alleged that Capriati was not accounting for
25 avoidable fraudulent transfers involving Capriati, Rocchio, his
26 other entities and his family members. In response to one of
27 SPER's objections, Capriati's financial expert opined that either
28 the transfers alleged by SPER were not avoidable fraudulent

1 transfers, or, to the extent that any were avoidable, no benefit
 2 existed for the estate and creditors because any amount recovered
 3 would not be collectible. In short, the cost of pursuing such
 4 claims exceeded any likely recovery.

5 After a two-day confirmation trial, at which the bankruptcy
 6 court considered SPER's allegations of fraudulent transfers
 7 involving Capriati, the court entered an order confirming the
 8 Plan. The Plan provisions relevant here are:

9 **9.1. Vesting of Assets.** Subject to the provisions of
 10 this Plan and as permitted by Section 1123(a)(5)(B) of the
 11 Bankruptcy Code, the Assets, **including the Litigation**
 12 **Claims⁴** and right, title, and interest being assumed by
 Reorganized Debtor in the assumed Executory Contracts,
shall be transferred to Reorganized Debtor on the
Effective Date.

13 **9.2. Preservation of Litigation Claims.** In accordance
 14 with Section 1123(b)(3) of the Bankruptcy Code, and except
 15 as otherwise expressly provided herein, **all Litigation**
 16 **Claims shall be assigned and transferred to Reorganized**
 17 **Debtor. Reorganized Debtor, as the successor in interest**
 to Debtor and the Estate, **may and shall have the exclusive**
right to sue on, settle, or compromise any and all
Litigation Claims, including derivative actions existing
against Debtor on the Effective Date.

18 **9.4. Injunction.** From and after the Effective Date . . .
 19 **all entities that have held, currently hold, or may hold**
 20 **a Claim . . . that is terminated pursuant to the terms of**
 this Plan **are permanently enjoined from** taking any of the
 21 following actions on account of any such Claims . . . :
 (I) **commencing or continuing in any manner any action or**
 22 **other proceeding against Reorganized Debtor or its**
property[.]

23 (Emphasis added).
 24

25 ⁴ Section 1.1.41 of the Plan defined "Litigation Claims" as
 26 "[a]ll rights, claims, torts, liens, liabilities, obligations,
 27 actions, causes of action, Avoidance Actions [including under
 §§ 544, 548, 550 & 551] derivative actions, proceedings, debts,
 28 contracts, judgments, damages and demands whatsoever in law or in
 equity, whether known or unknown, contingent or otherwise, that
 Debtor or the Estate may have against any Person."

1 **C. Capriati's motion for contempt**

2 More than a year after SPER was on notice that the fraudulent
3 transfer and alter ego claims alleged in the state court action
4 were property of the estate or of the Reorganized Debtor, SPER
5 filed another amended complaint in the state court action, this
6 time asserting claims against just Rocchio for Capriati's unpaid
7 legal fees, including claims for fraudulent transfer and alter
8 ego. Capriati was not named as a defendant, but SPER alleged that
9 Rocchio had caused Capriati to transfer its assets to him to avoid
10 paying creditors, including SPER. SPER again requested that
11 Rocchio be declared the alter ego of Capriati.

12 In response, Capriati filed a motion for contempt in the
13 bankruptcy court, seeking sanctions against SPER for its alleged
14 violations of the automatic stay and the discharge and/or Plan
15 injunction ("Contempt Motion"). Capriati argued that SPER's
16 fraudulent transfer and alter ego claims, which alleged only
17 general claims of injury to all creditors of Capriati, were
18 property of the estate that could only be pursued by Capriati and
19 which revested in the Reorganized Debtor upon confirmation; thus,
20 SPER's state court action pursuing those claims after Capriati's
21 bankruptcy filing and prior to Plan confirmation violated the
22 automatic stay under § 362(a)(3) and violated the Plan injunction
23 after confirmation. Capriati requested sanctions against SPER of
24 \$25,000 plus attorney's fees.

25 In opposition, SPER argued that Capriati was judicially
26 estopped from claiming that the fraudulent transfer and alter ego
27 claims were estate assets: Capriati never disclosed any possible
28 avoidance actions against Rocchio in its schedules or statements

1 of financial affairs; at no time prior to confirmation did
2 Capriati ever amend its schedules or statements of financial
3 affairs to disclose the fraudulent transfer and alter ego claims;
4 neither the Plan nor confirmation order reserved or disclosed the
5 claims as a "litigation asset" of the estate; the expert report
6 minimized the value of any fraudulent transfer claim; and the
7 approved disclosure statement disavowed the existence of any such
8 claim. Therefore, argued SPER, Capriati could not now assert that
9 the fraudulent transfer and alter ego claims were estate assets,
10 when Capriati had previously and successfully asserted before the
11 bankruptcy court in connection with Plan confirmation that no such
12 claims existed.

13 Next, SPER argued that Rocchio, a non-debtor, was not
14 protected by the automatic stay or Capriati's discharge. SPER
15 maintained that the claims against Rocchio in the state court
16 action were "direct" claims against him under Nevada law, not
17 derivative corporate claims. SPER argued that at least \$1,285,500
18 in Capriati distributions to Rocchio were recoverable for
19 unsecured creditors, which was more than double what they were
20 getting under the Plan.

21 In reply, Capriati maintained that it did not list any
22 avoidance actions against Rocchio in its schedules or statements
23 of financial affairs because it never believed that any such
24 claims existed. Moreover, the alleged excessive salary payments
25 to Rocchio were the subject of SPER's many objections and the crux
26 of its objection to Plan confirmation, which SPER fully litigated
27 at the confirmation trial. Capriati maintained that SPER's
28 allegations of fraudulent transfers were without merit or support

1 in fact or law; SPER presented no witnesses at the confirmation
2 trial and entered only one document into evidence – Capriati's
3 financial expert's report – which concluded that no viable
4 fraudulent transfer or avoidance actions against Rocchio existed.

5 At the Contempt Motion hearing, counsel for SPER conceded
6 that SPER had no "direct" claim against Rocchio individually and
7 independent from Capriati, but then argued that SPER had a direct,
8 in personam claim against Rocchio as "transferee" of a fraudulent
9 conveyance. Counsel maintained that such claim did not violate
10 the automatic stay or the Plan injunction, because it was not an
11 action to recover the asset for the benefit of Capriati's estate.

12 **D. The bankruptcy court's ruling on the Contempt Motion**

13 The bankruptcy court first determined that the Contempt
14 Motion failed on the basis of judicial estoppel. The court
15 focused on Capriati's prior statement that it did not believe any
16 fraudulent transfer and alter ego claims against Rocchio existed
17 and was unaware of any such claims. To the extent Capriati
18 believed otherwise, Capriati never disclosed the claims in its
19 bankruptcy papers filed under oath. Thus, because of its failure
20 to disclose and outright denial of the existence of any such
21 claims against Rocchio, the court reasoned that Capriati was
22 judicially estopped from now taking the inconsistent position that
23 such claims were estate assets revested in the Reorganized Debtor
24 upon confirmation of the Plan.

25 Alternatively, the court held that the Contempt Motion failed
26 because neither the automatic stay nor the discharge injunction
27 applied to Rocchio, a non-debtor Capriati officer and insider.
28 Sections 9.4 and 9.5 of the Plan prohibited post-confirmation and

1 post-discharge actions against the Reorganized Debtor or its
2 property but excepted direct liability claims against Capriati's
3 officers and other insiders. The court summarily concluded that
4 SPER's claims for fraudulent transfer and alter ego were "direct"
5 claims against Rocchio individually and therefore not protected by
6 the automatic stay or the discharge and/or Plan injunction.

7 Finally, the court found that Capriati failed to meet its
8 burden of proving either a willful violation of the automatic stay
9 or the discharge injunction; SPER legitimately believed that its
10 claims in the state court action were against Rocchio
11 individually.

12 **E. Capriati's motion for reconsideration**

13 Capriati timely moved for reconsideration of the Contempt
14 Order. The bankruptcy court denied the motion, determining that
15 Capriati had not presented any grounds for reconsideration.

16 This timely appeal followed.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
19 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C. § 158.

20 **III. ISSUES**

21 1. Did the bankruptcy court err by determining that SPER had not
22 willfully violated the automatic stay or the Plan injunction
23 without determining first whether the fraudulent transfer and
24 alter ego claims were either property of the estate or property of
25 the Reorganized Debtor?

26 2. Did the bankruptcy court err in determining that SPER had not
27 willfully violated the automatic stay or the Plan injunction and
28 therefore abused its discretion by not holding SPER in contempt?

1 3. Did the bankruptcy court abuse its discretion by invoking
2 judicial estoppel to deny the Contempt Motion?

3 4. Did the bankruptcy court abuse its discretion in denying the
4 motion to reconsider?

5 IV. STANDARDS OF REVIEW

6 Determining whether the bankruptcy court applied the correct
7 legal standard is a question of law reviewed de novo. Emmert v.
8 Taggart (In re Taggart), 548 B.R. 275, 286 (9th Cir. BAP 2016).
9 An erroneous view of the law may induce the bankruptcy court to
10 make a clearly erroneous finding of fact. Ozenne v. Bendon (In re
11 Ozenne), 337 B.R. 214, 218 (9th Cir. BAP 2006) (citing Power v.
12 Union Pac. R.R. Co., 655 F.2d 1380, 1382-83 (9th Cir. 1981)).

13 Whether property is included in a bankruptcy estate is a
14 question of law subject to de novo review. Cisneros v. Kim (In re
15 Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000).

16 We review for abuse of discretion the bankruptcy court's
17 decision to apply judicial estoppel, or preclusion of inconsistent
18 positions, to the facts of a case. Hamilton v. State Farm Fire &
19 Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001); Diamond Z Trailer,
20 Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 416 (9th Cir.
21 BAP 2007).

22 We review for an abuse of discretion the bankruptcy court's
23 decision whether to hold a party in civil contempt. Knupfer v.
24 Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003);
25 Rediger Inv. Servs. v. H. Granados Commc'ns, Inc. (In re H
26 Granados Commc'ns, Inc.), 503 B.R. 726, 731 (9th Cir. BAP 2013).
27 The underlying factual findings are reviewed for clear error.
28 In re Dyer, 322 F.3d at 1191; In re H Granados Commc'ns, Inc.,

1 503 B.R. at 731-32. A finding is clearly erroneous when it is
2 illogical, implausible or without support in the record. United
3 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

4 We review for an abuse of discretion the bankruptcy court's
5 decision to deny a reconsideration motion under Civil Rule 59.
6 Ybarra v. McDaniel, 656 F.3d 984, 998 (9th Cir. 2011); Cruz v.
7 Stein Strauss Tr. # 1361, PDQ Invs., LLC (In re Cruz), 516 B.R.
8 594, 601 (9th Cir. BAP 2014).

9 A bankruptcy court abuses its discretion if it applies the
10 wrong legal standard, misapplies the correct legal standard, or if
11 it makes factual findings that are illogical, implausible or
12 without support in inferences that may be drawn from the facts in
13 the record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
14 820, 832 (9th Cir. 2011).

15 V. DISCUSSION

16 A. The bankruptcy court's failure to determine ownership of the 17 fraudulent transfer and alter ego claims led to error.

18 The bankruptcy court denied the Contempt Motion in the first
19 instance based on its determination that judicial estoppel barred
20 the relief sought by Capriati, and second, summarily, on the
21 alternative grounds that the automatic stay and discharge and/or
22 Plan injunction did not apply to preclude SPER's filing and
23 pursuit of its "direct" claims for fraudulent transfer and alter
24 ego against Rocchio, a non-debtor third party and Capriati
25 insider. The bankruptcy court never determined whether the
26 fraudulent transfer and alter ego claims were property of the
27 estate or property of the Reorganized Debtor. This approach puts
28 the cart before the horse. The omission led to the erroneous or

1 incomplete finding that SPER's claims for fraudulent transfer and
2 alter ego were exclusively "direct" claims against Rocchio; the
3 record and the law are to the contrary. And this conclusion
4 improperly colored the determinations that followed.

5 Property of the estate includes "all legal or equitable
6 interests of the debtor in property as of the commencement of the
7 case." § 541(a)(1). A debtor's "causes of action" are "property
8 of the estate." Smith v. Arthur Andersen LLP, 421 F.3d 989, 1002
9 (9th Cir. 2005) (citing United States v. Whiting Pools, Inc.,
10 462 U.S. 198, 205 n.9 (1983)). Thus, the trustee, or in this case
11 the debtor-in-possession, stands in the shoes of the debtor
12 corporation and has standing to bring any suit that the debtor
13 corporation could have instituted had it not filed for bankruptcy
14 relief. Id. The trustee's standing to sue on behalf of the
15 estate is exclusive; a debtor's creditors cannot prosecute such
16 claims belonging to the estate absent abandonment. Estate of
17 Spiertos v. One San Bernardino Cty. Super. Ct., 443 F.3d 1172, 1175
18 (9th Cir. 2006).

19 Furthermore, § 1141(b) "vests **all** of the property of the
20 estate, scheduled and unscheduled, in the debtor upon plan
21 confirmation, unless the court or plan provides otherwise." In re
22 JZ L.L.C., 371 B.R. at 418 (emphasis in original). Hence, because
23 of § 1141(b), the general rule under § 554(d) – that property of
24 the estate that is not scheduled and not otherwise administered
25 before the case is closed and is not abandoned to the debtor at
26 the time of closing, but rather remains property of the estate,
27 forever – does not apply. Id. Thus, even undisclosed assets in a
28 chapter 11 case vest in the debtor under § 1141(b), unless the

1 plan provides otherwise. Id. at 419. Section 9.1 of the Plan
2 provides that all Litigation Claims, including all known or
3 unknown causes of action, Avoidance Actions and derivative
4 actions, vested in the Reorganized Debtor on the effective date.
5 This is not inconsistent with § 1141(b).

6 **1. The fraudulent transfer claim**

7 The crux of SPER's fraudulent transfer claim was Capriati's
8 alleged over-payment of salary to Rocchio, which SPER argued was a
9 transfer in fraud of all creditors and harmful to Capriati. In
10 other words, SPER's complaint alleged a direct injury to Capriati,
11 from which an injury to SPER was derived. "If a cause of action
12 alleges only indirect harm to a creditor (i.e., an injury which
13 derives from harm to the debtor), and the debtor could have raised
14 a claim for its direct injury under the applicable law, then the
15 cause of action belongs to the estate." Schertz-Cibolo-Universal
16 City, Indep. Sch. Dist. v. Wright (In re Educators Grp. Health
17 Tr.), 25 F.3d 1281, 1284 (5th Cir. 1994).

18 We conclude that SPER's fraudulent transfer claim asserted in
19 the state court action was property of Capriati's bankruptcy
20 estate by virtue of § 544(b) once Capriati filed its bankruptcy
21 petition, and such claim could only be pursued by Capriati.
22 § 548(a); The Cadle Co. v. Mims (In re Moore), 608 F.3d 253, 261
23 (5th Cir. 2010) (fraudulent transfer claims become estate property
24 "once bankruptcy is under way" by virtue of trustee's successor
25 rights under § 544(b)); Nat'l Tax Credit Partners, L.P. v. Havlik,
26 20 F.3d 705, 708-09 (7th Cir. 1994) (same). See also Whiting
27 Pools, Inc., 462 U.S. at 205 ("Section 541(a)(1) is intended to
28 include in the estate any property made available to the estate by

1 other provisions of the Bankruptcy Code," which would include
2 property made available through § 544).

3 We reject SPER's argument that it could pursue a direct claim
4 against Rocchio as the "transferee" of a fraudulent transfer under
5 Nevada law, namely NRS 112.220, which provides for recovery of the
6 value of the asset transferred from the transferee, during the
7 chapter 11 case. That statute does not consider the effect of a
8 corporate debtor's bankruptcy filing and the fact that a
9 prepetition claim for injury to the debtor by an insider's
10 fraudulent transfers is property of the corporate debtor's estate.

11 **2. The alter ego claim**

12 Whether the alter ego claim was property of the estate or of
13 the Reorganized Debtor is not as easy to determine. The alter ego
14 doctrine is used to establish the direct liability of a
15 shareholder when that shareholder improperly uses the corporate
16 entity to commit acts which harm the corporation. Here, SPER
17 alleged a traditional veil-piercing (alter ego) claim, whereby a
18 creditor attempts to place liability for a debtor-corporation's
19 obligations on its shareholders.

20 Whether an alter ego claim is property of the bankruptcy
21 estate depends on two things: (1) whether under state law where
22 the corporate debtor is incorporated, the debtor is permitted to
23 pierce its own corporate veil; and (2) whether the claim is a
24 general one, of the type that could be brought by any creditor of
25 the debtor. Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130,
26 132-33 (2d. Cir. 1993); S.I. Acquisition, Inc. v. Eastway Delivery
27 Serv., Inc., 817 F.2d 1142, 1152-53 (5th Cir. 1987); CBS, Inc. v.
28 Folks (In re Folks), 211 B.R. 378, 384, 387 (9th Cir. BAP 1997),

1 rev'd on other grounds by Ahcom, Ltd. v. Smeding, 623 F.3d 1248
2 (9th Cir. 2010); Murray v. Miner, 876 F. Supp. 512, 516 (S.D.N.Y.
3 1995); In re Davey Roofing Inc., 167 B.R. 604, 608 (Bankr. C.D.
4 Cal. 1994), rev'd on other grounds by Ahcom, Ltd. v. Smeding,
5 623 F.3d 1248 (9th Cir. 2010). If the answer to both of these
6 questions is yes, then the alter ego claim is property of the
7 estate, belongs to the trustee or debtor-in-possession, and cannot
8 belong to any individual creditor. In re Folks, 211 B.R. at 387
9 (citing Davey Roofing, Inc., 167 B.R. at 606). "This rule ensures
10 that all of a debtor's creditors receive equal treatment:
11 otherwise, those who asserted alter ego claims first would obtain
12 payment of the claims in preference to and to the detriment of
13 other creditors, despite having no greater claim on the alter
14 ego's assets." Murray, 876 F. Supp. at 516 (internal quotation
15 marks and citation omitted).

16 Despite SPER's assertion and the bankruptcy court's finding
17 to the contrary, the alter ego claim alleged here was a general,
18 as opposed to a personal or individualized, claim. "A cause of
19 action is personal if the claimant himself is harmed and no other
20 claimant or creditor has an interest in the cause." In re Folks,
21 211 B.R. at 387 (internal quotation marks and citation omitted).
22 "A general claim exists if the liability is to all creditors of
23 the corporation without regard to the personal dealings between
24 such officers and such creditors." Id. (internal quotation marks
25 and citation omitted). In other words, if the alter ego claim
26 alleges acts that harmed the financial condition of the
27 corporation as a whole and all creditors equally, such claims are
28 general alter ego claims. Id. See Kalb, Voorhis & Co., 8 F.3d at

1 133; In re Davey Roofing, Inc., 167 B.R. at 608.

2 SPER's alter ego claim alleging that Rocchio (1) had failed
3 to observe corporate formalities with respect to Capriati,
4 (2) used corporate funds for his own personal use, and (3) had
5 manipulated Capriati's assets and funds to avoid payment of
6 creditors was a general claim because all creditors are affected;
7 no particularized injury to SPER existed that could not be brought
8 by other Capriati creditors harmed by Rocchio's alleged bad acts.
9 Accordingly, the bankruptcy court clearly erred to the extent that
10 it found SPER had a "direct" or personal alter ego claim against
11 Rocchio that was not an asset of the chapter 11 estate.

12 As for the question of whether Capriati could pierce its own
13 corporate veil, the parties have been operating under the
14 assumption that Nevada alter ego law applies. However, Capriati
15 is a Rhode Island corporation. Thus, as noted above, Rhode Island
16 alter ego law applies.

17 Rhode Island recognizes the equitable doctrine of alter ego.
18 McFarland v. Brier, 769 A.2d 605, 613 (R.I. 2001) (alter ego
19 doctrine permits creditors of a corporation to reach assets of
20 individual(s) that control the corporation). However, we could
21 not locate any Rhode Island Supreme Court case answering the
22 question of whether a corporation may pierce its own veil.

23 In any event, the general rule in most (if not all) states is
24 that "alter ego" is not an independent cause of action, but is an
25 equitable remedy – a legal theory or doctrine used to impose
26 liability against the alter ego defendant under another cause of
27
28

1 action.⁵ We could not locate a Rhode Island Supreme Court case
 2 stating whether this is the law in Rhode Island, but based on that
 3 Court's use of the terms "equitable" and "doctrine" in cases
 4 discussing alter ego, we can assume that Rhode Island follows this
 5 general rule. See Heflin v. Koszela, 774 A.2d 25, 30 (R.I. 2001)
 6 ("To invoke the equitable alter ego doctrine . . .").

7 Thus, we question what value SPER's alter ego claim has as a
 8 remedy absent the ability to pursue the fraudulent transfer claim.

9 **3. SPER violated the automatic stay**

10 The bankruptcy court determined that SPER could not have
 11 violated the automatic stay by filing and pursuing its "direct"
 12 claims for fraudulent transfer and alter ego against Rocchio
 13 individually in the state court action. We do not argue the point
 14 that generally a non-debtor is not protected by the automatic
 15 stay. However, as we have determined, SPER's fraudulent transfer
 16 claim was not a "direct" claim against Rocchio, because it became
 17 property of the estate once Capriati filed its bankruptcy case.

18 The automatic stay continues to protect property of the
 19 estate so long as it retains that status. § 362(c)(1). While the
 20 automatic stay did not apply to Rocchio, it did apply to claims
 21 against property of the estate prior to confirmation under
 22
 23

24 ⁵ For example, in California "[a] claim against a defendant,
 25 based on the alter ego theory, is not itself a claim for
 26 substantive relief, e.g., breach of contract or to set aside a
 27 fraudulent conveyance, but rather, procedural . . ." Hennessey's
 28 Tavern, Inc. v. Am. Air Filter Co., 204 Cal. App. 3d 1351, 1359
 (1988). "Alter ego is merely a legal theory, or doctrine,
 employed to make a substantive cause of action applicable to the
 'alter ego defendant' where otherwise that claim could only be
 stated against the corporate entity." Id.

1 § 362(a)(3).⁶ As a result, SPER violated the automatic stay when
2 it asserted the fraudulent transfer and related alter ego claims
3 in its state court complaint. And acts in violation of the stay
4 are void, absent an annulment of the stay. SPER cannot rely on
5 those claims for relief either as initially pled or as amended.
6 Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th
7 Cir. 1992) (actions taken in violation of the automatic stay are
8 void).

9 Whether SPER has a post-Plan confirmation "direct" claim is
10 an issue for further consideration, but it must assert such a
11 claim as a new matter after confirmation and without reliance on
12 void assertions during the course of the case. However, SPER's
13 new attempt would remain subject to potentially successful attack
14 based on the discharge and Plan injunction and subject to defenses
15 such as the statute of limitations, as applicable.

16 Section 362(k) permits the recovery of damages resulting from
17 a stay violation. This subsection, however, applies only to
18 individuals, not corporations. In re H Granados Commc'ns, Inc.,
19 503 B.R. at 733. Nonetheless, a corporation may be entitled to
20 recovery for a stay violation under § 105(a) as a sanction for
21 civil contempt. Id.

22 To find a party in civil contempt for a stay violation, the
23 threshold inquiry focuses on a finding of "willfulness." Id.
24 (citing In re Dyer, 322 F.3d at 1191). The bankruptcy court must
25 find that: (1) the party knew of the automatic stay; and (2) the
26

27 ⁶ Under § 362(a)(3), the automatic stay prohibits "any act
28 to obtain possession of property of the estate or of property from
the estate or to exercise control over property of the estate."

1 party's actions that violated the stay were intentional. Id.
2 Whether the party exhibited bad faith or had a subjective intent
3 to violate the stay is irrelevant. Id. The movant bears the
4 burden of showing by clear and convincing evidence that the party
5 violated the stay. Id.

6 SPER has never claimed that it did not receive notice of
7 Capriati's bankruptcy filing. Indeed, it was careful not to
8 include Capriati as a defendant in the state court action, filed
9 just one week after Capriati filed its chapter 11 case. Further,
10 Frankewich, a bankruptcy attorney of over 30 years, is certainly
11 familiar with the rules of the automatic stay and knew or should
12 have known that usurping property of the bankruptcy estate is a
13 willful violation of the automatic stay. Her subjective belief
14 that the claims in the state court action were against Rocchio
15 only and not Capriati makes no difference for purposes here,
16 despite the bankruptcy court's ruling to the contrary. Because
17 the court applied an incorrect legal standard, its finding that
18 SPER had not willfully violated the automatic stay is clearly
19 erroneous. In re Ozenne, 337 B.R. at 218.

20 The record supported a determination that SPER willfully
21 violated the automatic stay by filing and continuing to pursue the
22 fraudulent transfer claim against Rocchio in the state court
23 action after Capriati filed its bankruptcy case and prior to
24 confirmation of the Plan. Therefore, the bankruptcy court abused
25 its discretion by not holding SPER in contempt.

26 **4. Whether SPER violated the discharge and/or Plan**
27 **injunction can be determined on remand.**

28 Per § 1141(b) and Sections 1.1.41, 9.1, 9.2 and 9.4 of the

1 Plan, the fraudulent transfer claim (and maybe the alter ego claim
2 if viable under Rhode Island law and if it was property of the
3 estate) appears to be a "Litigation Asset" that reverted to the
4 Reorganized Debtor upon confirmation of the Plan, gave the
5 Reorganized Debtor exclusive right to sue on, settle or compromise
6 that claim, and permanently enjoined any other parties from
7 commencing or continuing any action regarding that claim.

8 Capriati argues that the bankruptcy court erred by not holding
9 SPER in contempt for willfully violating the Plan injunction and
10 confirmation order, when it was clear that SPER was attempting to
11 take control over claims belonging to the Reorganized Debtor.

12 The contempt remedy is also available with respect to
13 violations of the discharge injunction under § 105(a). ZiLOG,
14 Inc. v. Corning (In re ZiLOG, Inc.), 450 F.3d 996, 1007 (9th Cir.
15 2006); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th
16 Cir. 2002); In re Taggart, 548 B.R. at 286. The party seeking
17 contempt sanctions has the burden of proving, by clear and
18 convincing evidence, that the alleged contemnor "(1) knew the
19 discharge injunction was applicable and (2) intended the actions
20 which violated the injunction." In re ZiLOG, Inc., 450 F.3d at
21 1007; Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th
22 Cir. 2002) ("The moving party has the burden of showing by clear
23 and convincing evidence that the contemnors violated a specific
24 and definite order of the court."). Knowledge of the injunction
25 is a question of fact that can normally be resolved only after an
26 evidentiary hearing. In re ZiLOG, Inc., 450 F.3d at 1007.
27 However, where the facts are not in dispute, no hearing need be
28 held. Id. at 1007 n.11 (citing In re Dyer, 322 F.3d at 1191-92).

1 Here, the bankruptcy court applied the correct legal standard
2 for a willful violation of the discharge or Plan injunction. It
3 is undisputed that SPER knew of the Plan injunction and
4 confirmation order given its objections to Plan confirmation,
5 which were overruled at the confirmation trial, and that SPER
6 continued to pursue the state court action post-confirmation.
7 However, it is not clear on this record whether SPER was aware
8 that the Plan injunction **applied** to its claims against Rocchio for
9 fraudulent transfer and alter ego. The bankruptcy court may need
10 to conduct an evidentiary hearing on remand to make that
11 determination.

12 **B. We need not decide whether the bankruptcy court abused its**
13 **discretion by invoking judicial estoppel to deny the Contempt**
Motion.

14 Capriati argues that the bankruptcy court misapplied and
15 grossly over-extended the doctrine of judicial estoppel. We do
16 not fault the court for wanting to apply some sort of equitable
17 doctrine in this case to deny Capriati's request for monetary
18 damages for contempt, which is all it requested. Like the
19 bankruptcy court, we question why a corporate debtor like Capriati
20 would concern itself with a creditor's pursuit of a third party,
21 albeit a corporate insider, in state court. The fairly obvious
22 reason Capriati was seeking monetary damages for contempt in the
23 bankruptcy court was to protect and benefit Rocchio, Capriati's
24 principal and sole shareholder.

25 Judicial estoppel is an equitable doctrine that precludes a
26 party from gaining an advantage by asserting one position, and
27 then later seeking an advantage by taking a clearly inconsistent
28 position, either in the same or different actions. Hamilton,

1 270 F.3d at 782-83. The court invokes judicial estoppel not only
2 to prevent a party from gaining an advantage by taking
3 inconsistent positions, "but also because of general
4 considerations of the orderly administration of justice and regard
5 for the dignity of judicial proceedings, and to protect against a
6 litigant playing fast and loose with the courts." Id. (internal
7 quotation marks and citation omitted).

8 Although Capriati as a chapter 11 debtor-in-possession and
9 revested debtor had exclusive standing to sue on causes of action
10 that were property of the estate, that right is subject to certain
11 equitable constraints. In re JZ, L.L.C. 371 B.R. at 418; § 1107.⁷
12 As the Panel has noted:

13 Section 1141(b) vesting does not mean that a debtor
14 necessarily has unfettered control over property of the
15 estate. It neither authorizes nor condones mischief, such
16 as omitting to schedule property. For that reason,
17 equitable constraints may be imposed in order to preserve
the integrity of the system. In principle, the full
panoply of equitable remedies, from constructive trust
through equitable and judicial estoppel, are available to
assure that debtors do not overreach.

18 In re JZ L.L.C., 371 B.R. at 420. Accordingly, as JZ L.L.C.
19 instructs, the bankruptcy court had discretion to apply an
20 equitable doctrine like judicial estoppel to deny Capriati
21 contempt damages. We simply disagree that applying the doctrine
22 without recognizing that a stay violation occurred and that SPER
23 continues to rely on void claims for relief is appropriate.

24 On remand, the bankruptcy court may certainly revisit any
25 equitable doctrine it deems appropriate to deny contempt damages

26 ⁷ Under § 1107(a), the debtor in possession is vested with
27 the rights, powers, and duties of a trustee, including the right
28 to sue and be sued. See § 323(b) (trustee has capacity to sue and
be sued).

1 to Capriati.

2 **C. The bankruptcy court abused its discretion in denying the**
 3 **motion to reconsider.**

4 A motion under Civil Rule 59(e) should not be granted unless
 5 the court is presented with newly discovered evidence, committed
 6 clear error, or if there is an intervening change of controlling
 7 law. 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th
 8 Cir. 1999). Capriati asked the bankruptcy court to reconsider its
 9 ruling on the Contempt Motion, arguing that the court had erred
 10 when it determined that (1) SPER had a direct claim against
 11 Rocchio, (2) that judicial estoppel authorized the court to allow
 12 a single creditor to bring postpetition and post-confirmation
 13 fraudulent transfer and alter ego claims, which were property of
 14 the estate and of the Reorganized Debtor, for the creditor's sole
 15 benefit, and that (3) SPER had not willfully violated the
 16 automatic stay or Plan injunction. Because we have determined
 17 that the court applied incorrect standards of law and made clearly
 18 erroneous findings of fact based on its erroneous view of the law,
 19 it abused its discretion by not granting Capriati's motion to
 20 reconsider.⁸

21 **VI. CONCLUSION**

22 For the foregoing reasons, we VACATE and REMAND the Contempt
 23 Order for the bankruptcy court to determine what sanctions are

24
 25 ⁸ SPER requests sanctions against Capriati for filing a
 26 frivolous appeal. First, Capriati has prevailed in this appeal.
 27 In addition, we deny SPER's request because it fails to comply
 28 with Rule 8020, which requires a party to request sanctions for a
 frivolous appeal by separate motion. State of Cal. Emp't Dev.
Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1154 (9th
 Cir. 1996).

1 appropriate for SPER's willful violation of the automatic stay and
2 perhaps willful violation of the Plan injunction. We leave to the
3 court's discretion as to whether any further proceedings are
4 necessary for it to make that determination.

EXHIBIT C

EXHIBIT C

Fill in this information to identify your case:

United States Bankruptcy Court for the:

DISTRICT OF NEVADA

Case number (if known) _____ Chapter 7☐ Check if this an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

4/19

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals*, is available.

1. Debtor's name	<u>Las Vegas Land Partners, LLC</u>	
2. All other names debtor used in the last 8 years Include any assumed names, trade names and doing business as names		
3. Debtor's federal Employer Identification Number (EIN) <u>20-1506231</u>		
4. Debtor's address	Principal place of business <u>375 E Warm Springs Road, Suite 104</u> <u>Las Vegas, NV 89119</u> Number, Street, City, State & ZIP Code <u>Clark</u> County	Mailing address, if different from principal place of business _____ P.O. Box, Number, Street, City, State & ZIP Code Location of principal assets, if different from principal place of business _____ Number, Street, City, State & ZIP Code
5. Debtor's website (URL) _____		
6. Type of debtor	<input checked="" type="checkbox"/> Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP)) <input type="checkbox"/> Partnership (excluding LLP) <input type="checkbox"/> Other. Specify: _____	

Debtor Las Vegas Land Partners, LLC
Name

Case number (if known) _____

7. Describe debtor's business A. Check one:

- ☐ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ☐ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ☐ Railroad (as defined in 11 U.S.C. § 101(44))
- ☐ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ☐ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ☐ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ☒ None of the above

B. Check all that apply

- ☐ Tax-exempt entity (as described in 26 U.S.C. § 501)
- ☐ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- ☐ Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor.
See <http://www.uscourts.gov/four-digit-national-association-naics-codes>.

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- ☒ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11. Check all that apply:

- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,725,625 (amount subject to adjustment on 4/01/22 and every 3 years after that).
- ☐ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). If the debtor is a small business debtor, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if all of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
- ☐ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
- ☐ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.

☐ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

- ☒ No.
- ☐ Yes.

If more than 2 cases, attach a separate list.

District _____	When _____	Case number _____
District _____	When _____	Case number _____

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

- ☒ No
- ☐ Yes.

List all cases. If more than 1, attach a separate list

Debtor _____	Relationship _____
District _____	When _____ Case number, if known _____

Debtor **Las Vegas Land Partners, LLC**
Name

Case number (if known)

11. Why is the case filed in this district?*Check all that apply:*

- ☒ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.
- ☐ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?☒ No☐ Yes.

Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (Check all that apply.)☐ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.

What is the hazard? _____

☐ It needs to be physically secured or protected from the weather.☐ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).☐ Other _____**Where is the property?** _____

Number, Street, City, State & ZIP Code

Is the property insured?☐ No☐ Yes. Insurance agency _____

Contact name _____

Phone _____

Statistical and administrative information**13. Debtor's estimation of available funds***Check one:*

- ☐ Funds will be available for distribution to unsecured creditors.
- ☒ After any administrative expenses are paid, no funds will be available to unsecured creditors.

14. Estimated number of creditors☒ 1-49☐ 50-99☐ 100-199☐ 200-999☐ 1,000-5,000☐ 5001-10,000☐ 10,001-25,000☐ 25,001-50,000☐ 50,001-100,000☐ More than 100,000**15. Estimated Assets**☒ \$0 - \$50,000☐ \$50,001 - \$100,000☐ \$100,001 - \$500,000☐ \$500,001 - \$1 million☐ \$1,000,001 - \$10 million☐ \$10,000,001 - \$50 million☐ \$50,000,001 - \$100 million☐ \$100,000,001 - \$500 million☐ \$500,000,001 - \$1 billion☐ \$1,000,000,001 - \$10 billion☐ \$10,000,000,001 - \$50 billion☐ More than \$50 billion**16. Estimated liabilities**☒ \$0 - \$50,000☐ \$50,001 - \$100,000☐ \$100,001 - \$500,000☐ \$500,001 - \$1 million☐ \$1,000,001 - \$10 million☐ \$10,000,001 - \$50 million☐ \$50,000,001 - \$100 million☐ \$100,000,001 - \$500 million☐ \$500,000,001 - \$1 billion☐ \$1,000,000,001 - \$10 billion☐ \$10,000,000,001 - \$50 billion☐ More than \$50 billion

Debtor **Las Vegas Land Partners, LLC**
Name

Case number (if known)

Request for Relief, Declaration, and Signatures**WARNING** -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.**17. Declaration and signature
of authorized
representative of debtor**

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **August 19, 2019**
MM / DD / YYYY**X /s/ David Mitchell**

Signature of authorized representative of debtor

David Mitchell

Printed name

Title **Managing Member****18. Signature of attorney****X /s/ H. Stan Johnson, Esq.**

Signature of attorney for debtor

Date **August 19, 2019**

MM / DD / YYYY

H. Stan Johnson, Esq.

Printed name

Cohen|Johnson|Parker|Edwards

Firm name

375 E Warm Springs Road, Ste 104**Las Vegas, NV 89119**

Number, Street, City, State & ZIP Code

Contact phone

Email address

0265 NV

Bar number and State

Las Vegas Land Partners, LLC
375 E Warm Springs Road, Suite 104
Las Vegas, NV 89119

H. Stan Johnson, Esq.
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Las Vegas, NV 89119

Clark County Assessor
500 South Grand Central Pkwy
2nd Floor
Las Vegas, NV 89155

Clark County Treasurer
c/o Bankruptcy Clerk
500 S. Grand Central Pkwy
Box 551220
Las Vegas, NV 89155-1220

Dept. of Employment Train Rehabilitation
500 E. Third St.
Carson City, NV

Internal Revenue Service
Centralized Insolvency Operations
P.O. Box 21126
Philadelphia, PA 19114-0326

Massachusetts Department of Revenue
Bankruptcy Unit
P.O. Box 9564
100 Cambridge Street, 7th Floor
Boston, MA 02114-9564

Nevada Department of Taxation
1550 College Parkway, Ste. 115
Carson City, NV 89706-7937

State of Nevada Dept. of Motor Vehicles
Attn: Legal Division
555 Wright Way
Carson City, NV 89711-0725

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300 Las Vegas Blvd. South #4300
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Hazlet, NJ 07730

Veritex
2250 S Rancho Dr #195
Las Vegas, NV 89102

**United States Bankruptcy Court
District of Nevada**

In re **Las Vegas Land Partners, LLC**

Debtor(s)

Case No.
Chapter

7

CORPORATE OWNERSHIP STATEMENT (RULE 7007.1)

Pursuant to Federal Rule of Bankruptcy Procedure 7007.1 and to enable the Judges to evaluate possible disqualification or recusal, the undersigned counsel for **Las Vegas Land Partners, LLC** in the above captioned action, certifies that the following is a (are) corporation(s), other than the debtor or a governmental unit, that directly or indirectly own(s) 10% or more of any class of the corporation's(s') equity interests, or states that there are no entities to report under FRBP 7007.1:

☒ None [*Check if applicable*]

August 19, 2019

Date

/s/ H. Stan Johnson, Esq.

H. Stan Johnson, Esq.

Signature of Attorney or Litigant

Counsel for **Las Vegas Land Partners, LLC**

Cohen|Johnson|Parker|Edwards

375 E Warm Springs Road, Ste 104

Las Vegas, NV 89119